THE JUDICIAL FUNCTION

and

Industrial and International Disputes

The William H. White Lectures at the University of Virginia

BY

ROBERT N. WILKIN

United States District Judge

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To

Dean William M. Lile

Professor Charles A. Graves

Professor Raleigh C. Minor

and

Judge J. Foster Wilkin

who inspired a reverence for law

THE WILLIAM H. WHITE FOUNDATION

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"If democratic institutions are to survive, it will not be simply by maintaining majority rule and by swift adaptations to the demands of the moment, but by the dominance of a sense of justice which will not long survive if judicial processes do not conserve it. The Judge must in truth represent authority, but he is the symbol not so much of power as of justice, of patience and fairness, of a weighing of evidence in scales with which prejudice has not tampered, of reasoned conclusions satisfying a sensitive conscience, of firmness in resisting both solicitation and clamor.

"It is in the quality of judicial work—whether performed by courts or by agencies invested with judicial functions—in its expertness, thoroughness, independence and impartiality, that the whole scheme of the law, of government by law, comes to the decisive test. And only as that test is successfully met will the foundations of a sound democracy be made secure."

(Chief Justice Hughes, Address before the Law Institute, 1940, quoted by Justice Frankfurter in his address before the Law Institute, 1948.)

Foreword

Political government is a necessity of man's nature. History, science, religion, all support the observation of Aristotle that "Man is by nature a political animal." The state is therefore the fulfillment of a common need of mankind. Whenever men's interests have impinged, some organization to preserve order has been necessary. From earliest Patriarchal society to the modern state, government has existed to defend the community, to punish crimes, to redress wrongs, to decide disputes. And the first sentence of the United Nations Charter says its purpose is "To maintain international peace and security".

While we find different forms of government at different times and in different places, there are certain functions that are constant because they are the expression of a common need. The history of government teaches that its essential function has been communal defense, defense against aggression from outside and defense against violence within; or in other words, preparation for war with outsiders and maintenance of peace within the community. But now that facility of travel and of communication has made the whole world one community, the chief purpose of all government is, or ought to be, exclusively the maintenance of peace.

Because the nation-states are temporal and their forms of government are special, it is quite natural that our universal human nature and general need should bring into being some higher unity of mankind of which the nations will be only parts. If humanity is in truth a whole, if it is animated by

a universal spirit, if it has common needs and aspirations, how can it avoid striving for the embodiment of its proper essence in a political organization for the whole world?

The principal means for the preservation of peace was in the beginning and always has been the maintenance of a method or authority for the settlement of disputes by civil process. The action of government which affords that peaceful process is the judicial function.

It is the purpose of this study to examine briefly the nature and evolution of the judicial function; to inquire as to its accomplishments, and to determine under what conditions it serves best—all with the object of developing what may reasonably be expected of it with reference to the two great problems now confronting us, industrial disputes and international disputes. The study is in three parts: In I we consider The Judicial Function; in II we consider it with reference to Industrial Disputes; and in III we consider it with reference to International Disputes.

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I

The Judicial Function

PART ONE

Ancient History

The history of the world has been told largely in terms of dynasties and military campaigns, but the rights and liberties of man have been forged and molded by the judicial process. In the struggle for freedom the acts and physical courage of political and military leaders have been spectacular, but the thought and moral courage of lawyers and judges have been more effective.

The world is indebted to Rome for its law, but it is indebted to England for its best system of administering the

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law It was in England that the separation of the judicial function from other processes of government was first made complete It was in England that independent courts, presided over by men of special learning and experience in the law, were first established The importance of the English judiciary to political evolution has not been sufficiently stressed and can hardly be over-emphasized It developed and implemented constitutionalism, the only practical course between the extremes of anarchy and autocracy Constitutionalism maintains the best balance between freedom and order And that balance is the foundation of our way of life and the source of our civil liberties

But before we consider the development of the judicial function in England, we should make a cursory survey of the judicial function in ancient history To appreciate its later development we must see it against its earlier background

In the beginning the settlement of disputes was such an integral part of government that it was not revealed as a separate function The essential purpose of the ruler was to judge The judicial antedated the legislative function The earliest law was not an enunciation of a rule of conduct, but a judgment in a particular case [1] pronounced after the facts had occurred, by a leader or ruler, sometimes called king and sometimes judge [2] During the Roman Empire [3] and until a comparatively recent time in England [4]

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1. Dwight, Theo W, Introduction to Ancient Law IV, 3rd Am fr 5th London Ed , MacIver R M "The Web of Government', pp 90, 95, New York, Macmillan Co 1947, Sabine, G H, "History of Political Theory", pp 200, 203, New York, Henry Holt & Co, 1938
2. Maine, H S, "Ancient Law", 4
3. Dwight, *supra* LXIX
4. Macaulay's Eng, Ch 1, p 66

the doctrine was maintained that the sovereign was the fountain of all justice, and even yet it is quite universal to recognize the sovereign or chief executive as the depositary of all pardoning power.

For a description of the situation in which mankind disclosed themselves at the dawn of their history, Henry Sumner Maine in his authoritative work on Ancient Law was content to quote a few lines from Homer's Odyssey

> "They have neither assemblies for consultation nor *themistes* but everyone exercises jurisdiction over his wives and his children and they pay no regard to one another" (*Ancient Law* 120)

That is a brief but accurate Greek description of Patriarchal society and is confirmed by Scriptural history of the Hebrews The evidence is so general, indeed that Maine was forced to conclude that it was difficult "to say of what races of men it is not allowable to lay down that the society in which they are united was originally organized on the patriarchal model" [5]

The next step in the evolution of government was the aggregation of families The unit of ancient society was not the individual but the family An aggregation of families formed the Gens or House An aggregation of Houses then made the Tribe And finally an aggregation of Tribes constituted the Commonwealth or State That is what happened when the elders of Israel said to their patriarch Samuel "Now make us a king to judge us like all the nations" [6] The authority which ruled the family carried over to the Tribe and State The word of the parent or elder was law The people were held together by obedience to the chief This life-long authority of the father or other

5 MacIver *supra* p 33
6. I Samuel, 8 5

ancestor over the person and property of his descendants became well recognized in Roman society as *Patria Potestas*. When our information commences, the parent has power of life and death (*jus vitae necesque*) and of uncontrolled corporal chastisement.[7] He, as representative of the basic social unit, held all property and supreme authority.

As social and political evolution progressed, however, that power of the parent was compelled to assume humbler proportions. The transition is not marked out in detail, but it seems clear that the duties which the son came in time to owe to the king of the state must have tempered the authority of the parent if they did not annul it. But whether the patriarchal power of government was in father, chief, or king, it was autocratic.[8] It was always sufficient to meet the needs of family, clan, and state; and it always included the judicial function. Early literature abounds in references to the kings who sat in judgment in the gates of the city. The gates of the city were the earliest embodiment of a courthouse.[9] With the growth of larger kingdoms the judicial function was sometimes delegated to elders or other ministers of state, but they served as deputies of the king, and the right of appeal to the king remained. His power was supreme.

In time the autocratic power of kings became modified through the assumption of power by the nobles. This same general change took place in Athens,[10] in Rome,[11] in

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7. Maine, *supra*, p. 133.

8. Tytler, A. F., Tytler's History, Book 1, Chap. 1, p. 20.

9. II Samuel 15:1 to 6.

10. Laistner, M. L. W., "Greek History", p. 157, New York, D. C. Heath & Co., 1932.

11. Liddell, H. G., "History of Rome", p. 63, New York, Harper & Bros., 1872.

England.[12] The monarchy was succeeded by an oligarchy. Step by step the nobles encroached upon or limited the royal power. If the title of king remained, it was only honorary. Government was controlled by a council of clanheads or nobles. In Athens this council became the Areopagus, in Rome the Senate, in England the House of Lords. Their general assumption of power included the judicial function. While they performed executive and legislative functions, they also sat as courts. There was indeed no distinction or classification of function at the time; these assemblies of nobles, ex-magistrates, and lords of the land did whatever seemed necessary for the peace and good order of the community.

The subsequent growth of judicial work required some delegation of powers. In Athens the thesmothetes (thesmothetae or archons) were appointed "that they might publicly record all legal decisions and act as guardians of them with a view to determining the issues between litigants." [13] With the later development of Athenian democracy these thesmothetes became presidents of the tribunals charged with judicial responsibilities and thus evolved into judges instead of mere recorders of judgments.[14]

In Rome the Senate appointed committees or commissions (quaestiones) for the trial of certain cases. They were much like today's legislative committees of inquiry. At

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12. Plucknett, T. F. T., "Concise History of the Common Law", p. 21, 2nd ed., Rochester, Lawyer's Coop. Pub. Co., 1936; Maitland, F. W., "The Constitutional History of England", pp. 72-84, Cambridge Univ. Press, 1913; Maitland, F. W. and Montague, F. C., "Sketch of English Legal History", pp. 107, 114, New York, G. P. Putnam Sons, 1915.

13. Aristotle, "Constitution of Rome", 3.

14. Laistner, *supra*, p. 158.

first they were presided over by the quaestors, but in time such quaestors became principally financial officers, and the praetors, who at first had succeeded to much of the king's powers, took over the presidency of such regular courts as had developed from the quaestiones.[15]

In England the development of separate courts was a somewhat different story, to be considered later. But in all three countries the judicial function became partially divorced from other processes of government. In Athens and Rome, however, the judicial office was filled by men of no special training and only for limited terms. Magistrates in the usual succession of offices became presidents of the courts and then retired or moved on to other offices. They were politicians and political influence was in the courts. It was due to the fact that most of the praetors were uninformed and inexperienced in the law that the work of the jurisconsults became necessary and made such a remarkable contribution to the development of Roman law.

With the subsequent development of democracy in both Athens and Rome, the thought became prevalent that all the functions of government were vested in the people. Sovereignty passed first from the king to an oligarchy and then from the oligarchy to popular assemblies—the Ecclesia in Athens,[16] the Concilium Plebis or Comitia in Rome.[17] But such distribution of authority caused a disintegration of

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15. Hunter, W. A., "Roman Law", 2nd ed., p. 44, Cambridge Ancient History, Vol. IX, p. 306, New York, Macmillan, 1932: London: Wm. Maxwell & Son also; Dwight, *supra*, LXVII.

16. Laistner, *supra*, pp. 331, 332.

17. Cambridge Ancient History, *supra*, p. 28; Hunter, *supra*, p. 26, n. 1.

government. The central power was insufficient to preserve the peace.[18]

Government by plebiscite is impossible. The problems of government require study, deliberation, consultation and prompt adjustments—procedures not readily obtainable from masses and popular assemblies.[19] Democratic ideals are highly commendable. The common welfare is the proper aim and test of good government. But while matters of policy and choice of representatives may well be determined by popular vote, other duties must be entrusted to public officers. The people are the "fountain of power", the source of authority, but the power to act must be with the government. "It is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government." [20] It is the business of government to govern—to maintain a discipline over all for the realization of its "principal purpose", which is, according to the *Federalist*, "the common defence of the members, the preservation of the public peace, as well against internal convulsions as external attacks." And the conclusion of *The Federalist* is equally sound, that "the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained." [21]

The experience of Athens and Rome supports the assertion that "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one,

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18. Laistner, *supra*, pp. 336-7; Cambridge Ancient History, *supra*, p. 29.

19. Bluntschli, J. K., "Theory of the State", pp. 464 et seq.

20. *The Federalist*, p. 318, New York, G. P. Putnam Sons, 1899.

21. *The Federalist*, *supra*, p. 136.

a few, or many . . . may justly be pronounced the very definition of tyranny." [22] Not only did the popular assemblies of those city-states exercise legislative and executive powers, they assumed supreme authority in judicial matters. Owing to the inherent difficulty of properly conducting complicated cases before an assembly so little fitted for exhaustive investigation and patient discrimination of evidence, there developed in the early Roman Republic, as stated, a practice of delegating some of the judicial power to one or more commissioners (quaestors).

This practice led to the establishment of some permanent courts for some cases. But always the theoretical supremacy of the Comitia remained. In Athens there were similar references of some cases to the Council or standing committees. But in both cities there was always the right of appeal to the people.

Furthermore the jurisdiction of these popular assemblies was quite broad and undefined. The magistrate who preferred a charge before the Comitia supported it by evidence on the day of trial and then presented a bill embodying the penalties he proposed. This bill the Comitia accepted or rejected.

> "They might act in precise accordance with a clear provision of the law, or they might adapt a provision of some existing law to the more or less similar circumstances of the particular case, or they might ground their decision on some previous decisions in similar cases not embodied in any law; or they might be guided in their judgment merely by the general feeling of the time in regard to the particular offense." [23]

These popular assemblies were swayed and manipulated by

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22. *The Federalist, supra,* p. 300.
23. Hunter, *supra,* p. 56.

demagogues interested only in party, class, or personal aggrandizement.[24] They lacked the detachment and diligence necessary to discover truth. They were moved by emotion and desire. The intelligence of the people who constituted these assemblies, especially the Greek ecclesia, was highly developed; yet the majority was unable to resist the seductive arts of the demagogues. It was impossible for them to exercise their power with wisdom and justice. The purposes of government and courts of law were therefore subverted by the tyranny of the mob. The powers of the ecclesia embraced the whole life of the state. Its decisions were as decisive as those of an absolute despot; like him the demos could command what it pleased, even though contrary to the law. As democracy developed, lot supplanted the previous qualifications of birth and wealth, and the archons were henceforth only servants of the demos, and powerless presidents of the numerous courts of justice. The corruption of sycophants and judges rapidly increased and it was impossible to realize the essential purposes of government.[25]

"Hence", as John M. Zane has remarked, "when the legal system is so instituted that the legislative body can decide a lawsuit by an edict for a particular case, it is neither legislating nor adjudicating, but is simply exerting arbitrary and uncontrolled power, than which nothing is more contrary to the fundamental basis of justice. But this was not understood at Athens, nor was it understood at Rome during the days of the Roman Republic, nor is it understood today by those who talk of free judicial decision, meaning a decision where the judge freely disregards the law, because he thinks that for the particular case he can make a

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24. Laistner, *supra*, p. 335.
25. Bluntschli, *supra*, pp. 461, 462, 463.

better law . . . Cicero stated, 'Justice requires that in the same cases there shall be the same laws' or, as it has been stated in modern law, 'the equal protection of the laws means the protection of equal laws'. Rome never truly developed this idea of justice, and of equal laws, until the Republic was no more. In order to insure equal laws it was found, long ages after the Greeks and Romans, that the judicial power must be separately and independently exercised."

It was this disintegration of government, the failure of government to govern according to law, that produced dictatorship and hastened the era of the great monarchies in Greece [26] and the Empire at Rome.[27] What the great legal minds of the Empire contributed to law is well recognized. It will not be necessary for us to consider that in detail. They developed a system of private law which has become the basis of law for all civilized countries. But they made no contribution to the judicial function as such.[28]

Government itself was not made subject to law until after the disintegration of the Empire. Subsequent to the Dark Ages, England made its great contribution to public law. Only by developing an independent judiciary did it establish a system of administration which could assure a government, not of men but of law.

To summarize the revelations of ancient history we may say:

Government (the state) is a requirement of man's nature;

The judicial function (settlement of disputes) is an essential part of government;

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26. Laistner, *supra*, p. 337.

27. Cambridge Ancient History, *supra*, pp. 93, 308.

28. Hunter, *supra*, pp. 1045-6; Dwight, *supra*, LXIX.

The judicial process is necessary to enable the state to realize its main purpose, viz., to preserve the peace and develop the common welfare.

Government was at first a monarchy
Then an oligarchy
Then a democracy
Then an Empire.

None of these forms of government developed a detached, permanent, independent organization for the exercise of the judicial function.

They all passed away.

DARK AGES

The Dark Ages almost blotted out the experience of Ancient History. The disintegration of government and the reversion of society to primitive practices was so complete that it is necessary in our study of man's political evolution to begin anew at about the end of the Ninth Century.[29] We are generally too ready to think of ourselves as direct descendants of Israel, Greece and Rome. But a dark chasm intervenes between us and those ancient civilizations. In order to understand our own institutions it is necessary for us to understand what it was that brought us up out of the dark ravine of the Eighth and Ninth Centuries.

A distinguished modern historian has given us a good description of conditions in Europe during the Dark Ages:

> "Society was ruled by force—there was no law. There had been, but no one longer knew it. People got their living, as long as they had any, through agriculture. There were only two professions. Those who did not work at occupations closely associated with farming were either fighters or clergymen. . . . Orderly government was gone. Each little land-locked community looked after it-

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29. Sabine, *supra*, p. 199.

self, never knowing when some band of raiders would come over the hill or water from north or south or east or west to steal their crops and herds, violate their women, and kill their men. There was no recognized ruler. Each generation had to determine its leaders from among its fighting men, and this was done as much by fighting each other as by fighting raiders from the neighboring locality. Warfare was hand to hand with sword and battle-axe, spear and lance. Those who could lay hands on helmets and armor and shields relied on them for protection; and, in larger neighborhoods, they built massive heaps of heavy masonry where they might hold out against superior numbers of raiders. . . . There was no respect for private property. The warriors took what they needed or wanted. If the community happened to have plenty of foodstuff, everyone got some of it; if it didn't, which was usually the case, they took from each other.

Balanced meals were unknown; the diet of most persons was little above the starvation level most of the time. Even the cattle were under-nourished; and, since each neighborhood was chronically at war with every other that touched it, there was no commerce worth mentioning. . . . The task of mere survival under such conditions consumed all the time and energy of the populace. This went on for generation after generation until it seemed that society was operating in a perpetual treadmill dominated by sheer brute force, man against man." [30]

For its deliverance from that dark abyss of feudal anarchy humanity is indebted to the Christian church.[31] It

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30. Krey, A. C., "Can Law Supplant Force in International Affairs?", Vol. 1, No. 1, *Pacific Spectator*, p. 77 et seq.

31. Sabine, *supra*, p. 224; Heimann, Eduard, "Freedom and Order", p. 54, New York, Chas. Scribner's Sons, 1947; Maritain, Jacques, "Christianity and Democracy", pp. 27, 37, 48, New York, Scribner's, 1945; Babbitt, Irving, "Democracy and Leadership", p. 175, Boston, Houghton, Mifflin Co., 1939.

is also due to the influence of that church and its ministers that man was able to attain the supreme accomplishment of his political evolution—an independent judiciary.

During the Dark Ages Christianity had been spreading among all classes of people. The influence of the church expanded in spite of the general disintegration of law and order. Men generally believed in the immortality of the soul and that life on earth was a preparation for eternity. Even the most truculent warrior was at times influenced by such beliefs. Men, both nobles and peasants, who became discouraged by the cruel and chaotic conditions entered monastic orders. The clergy, although not more than one per cent. of the population, exerted a strong influence. They could read and write. Because of their vows of poverty, chastity and obedience, they were given a measure of immunity from violence. They were free to move from place to place unmolested.

In the year 980 a group of churchmen met at Charroux in southern France and passed a resolution condemning to eternal damnation those who "broke into churches, did violence to churchmen, or stole the possessions of the poor." This became known as the "Peace of God". The success of this enactment led to another church council thirty years later which established the "Truce of God", by a resolution proclaiming the period from Saturday noon to Monday morning as free from neighborhood warfare. These modest but effective restraints on warfare and violence were the beginning of a regeneration of orderly society.

As private and neighborhood warfare was curbed by successive councils, a great advance was made in the settlement of disputes by peaceful means. Churchmen led in this movement, too. Naturally they looked first to the canon or church law for rules of decision, and when it was inade-

quate they had recourse to the Roman civil law. The legal work of the churchmen greatly increased during the Crusades, which the churchmen had inspired by telling the knights that if they must fight they should fight the infidel. The church assumed guardianship of the families and property of the Crusaders, and disputes that occurred regarding these wards and trust-estates had to be settled in church courts. Bishops became absorbed in such legal business. The great monasteries like Cluny, in addition to courses in the arts and crafts, began to train churchmen for the administration of legal work and many of their archdeacons were sent to Bologna for courses in Roman civil law.[32] These church courts gained such respect that soon men who were not Crusaders or churchmen were submitting their disputes to them rather than to gauge of battle.

The greater lords soon found that this civil order was beneficial to their estates. The men who were released from warfare learned manual arts and crafts at the great monasteries, and the farmers were free to harvest their crops. The great monarchs, such as Henry II of Germany, and Robert of France, gave full support to the churchmen at the beginning of the Eleventh Century. Lesser rulers strengthened their own possessions and power by supporting the Peace of God and the Truce of God and the legal administration of the churchmen. Canon and Roman law provided a legal basis for the settlement of many quarrels. Soon the kings and feudal lords began to take into their employ churchmen who were trained in the law, first as prime ministers and later as administrators in other offices. The profession of law was thus reborn about the middle of the

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32. Sabine, *supra*, p. 229.

Twelfth Century. The ecclesiastical origin of the profession is still witnessed by the robes worn by the judiciary.[33]

ANGLO-SAXON ENGLAND

The influence of Christianity and the churchmen reached England as well as the Continent of Europe. An early effect upon Anglo-Saxon custom is to be found in the practice of recording not only laws but also the titles to land, which thereafter was referred to as Bookland.[34] Economic security based on land ownership found protection in law. It is not necessary to dwell at length upon Anglo-Saxon legal institutions. Our legal history begins with the Norman Conquest. It should be noted, however, that with the advent of Christianity the responsibility of the family or clan for wrongs passed out and responsibility became more individualistic. Accountability for actions gradually shifted from the whole group to the particular individual who did the act.

We are not surprised to learn that when William the Conqueror began to establish a permanent government for all England, he named as one of his chief ministers Lanfranc, who had studied and taught in the law school of Pavia, a school which had grown from the inspiration of Ravenna and Bologna. From Pavia, Lanfranc had gone to Normandy and had become the chief adviser of Duke William. William brought him to England and made him Archbishop of Canterbury.[35]

There had been communal courts in England prior to

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33. Krey, *supra;* Sabine, G. H., "History of Political Theory", p. 231, New York, Henry Holt & Co., 1938.

34. Plucknett, *supra*, p. 263.

35. Plucknett, *supra*, p. 263.

the Conquest, known as courts of the Shire and the Hundred. There were also feudal courts based upon the relation between man and lord, and Manorial courts which the barons maintained for settlement of disputes between their tenants; courts Merchant existed at some of the centers of trade; and there was the king's own central court. But no one could bring his suit before the king unless he had first failed in the local courts.[36]

To modern eyes Anglo-Saxon justice seems strangely defective. Jurisdiction was based not upon the authority of the state but upon the consent of the parties.[37] People who accepted its jurisdiction were honor-bound to abide the judgment, but the court could not compel their obedience other than through forfeiture of pledges. Courts at that time were much like the tribunals of arbitration which have been appointed to settle disputes between sovereign states. The early courts pronounced their "dooms" but the execution of the "doom" was largely left to private hands. Distraint of property or person was the method usually resorted to. Judgments enforced by the state came later. The reign of law had to be slowly and laboriously established. The Normans and the churchmen served to that end.

PART TWO

NORMAN ENGLAND

The most valuable thing that the Norman Conquest afforded was a strong kingship which made for national unity. The Conqueror ordered a census inquest, the record of which came to be known as Doomsday Book. In it were

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36. Maitland, *supra*, p. 105.

37. Maitland and Montague, *supra*, p. 11.

listed the names and possessions of the subjects of the realm. This record of the land and its terms of ownership perpetuated the chain of feudal relationships and assured the overlordship of the Crown. The title of every piece of land recognized that it was held by the tenant of the feudal lord, who in turn held it of the king. England became the most perfectly organized feudal state in Europe. Doomsday Book with its record of land titles and feudal obligations became the anvil upon which Roman theory and Anglo-Saxon custom were welded into the common law.

The Conqueror forbade the bishops to transact ecclesiastical business in the Hundred and County courts. He insisted that they should restrict their political and legal activity to the purposes of the courts Christian, i. e., church issues, domestic relations, and the settlement of decedents' estates. This order was the first wedge for the separation of courts from the church. The Conqueror appointed his own justiciars and sheriffs to preside over the local courts, but most of the justiciars appointed by him for the local courts and for the king's court were men of the church. They served, however, as officers of the state, not of the church.

One of his last acts was the calling of the Council at Salisbury. There all his councillors and, in the words of a chronicle of that day, "all the land-owning men of property that there were all over England, . . . bowed down to him and became his men, and swore oaths of fealty to him that they would be faithful to him against all men"—even against their immediate lords. Thus William set his full influence against the feudal anarchy and private warfare which had been afflicting England.[38]

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38. Maitland, *supra*, p. 9; Plucknett, *supra*, p. 13.

The Conqueror did not superimpose on England an entirely new system of law. He recognized English laws, but laid the foundation for their unification. In one of the few legislative acts of the time William provided: "This I will and order, that all shall have and hold the laws of King Edward as to lands and all other things with these additions which I have established for the good of the English people." He set the precedent of issuing charters. In his charter to the City of London he said: "I will that you . . . be worthy of all the laws that you were worthy of in King Edward's day. And I will that every child be his father's heir after his father's day, and I will not endure that any man offer any wrong to you." That policy supported what had become known as the "King's Peace".

William's successors were great administrators and they continued to work for the unification of England and English laws. The charter by which Henry I won the support of the people became the model for Magna Charta. The king personified national unity and set up legal machinery to serve and protect the national interest. He made Roger, Bishop of Salisbury, his chief justiciar. Untrustworthy sheriffs of the local courts were dismissed by him and justiciars were sent on circuit to look after the Pleas of the Crown; and they extended their jurisdiction immensely by holding that any matter which concerned the peace could be treated as a Plea of the Crown. A chronicle of the time of Henry's death recites: "A good man he was and there was great awe of him. No man durst misdo against another in his time. He made peace for man and beast." [39]

The greatest advance in legal unification was made in the reign of Henry II. He greatly extended the system of itin-

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39. Plucknett, *supra*, p. 16.

erant justices. They developed the use of the sworn inquest for determination of facts, which soon grew into jury trial. More speedy methods of trying cases were provided. The Assize or Constitution of Clarendon made way for a completely remodeled and systematized criminal procedure. Thereafter ordeals and the judicial combat yielded to judicial process based upon the oath of witnesses. The presentation of criminal charges was made by what is known to us as the grand jury; crime became a wrong against the state, not merely against the clan or the individual affected. But, most important of all, the jurisdiction of the king's own court was extended.

Maitland and Montague, in their sketch of English legal history, say:

> "What Henry did in the middle of the Twelfth Century was of the utmost importance, though we might find ourselves in the midst of obsolete technicalities were we to endeaver to describe it at length. Speaking briefly, we may say that he concentrated the whole system of English justice round a court of judges professionally expert in the law. He could thus win money—in the Middle Ages no one did justice for nothing—and he could thus win power; he could control, and he could starve, the courts of the feudatories. In offering the nation his royal justice, he offered a strong and sound commodity. Very soon we find very small people—yeomen, peasants, —giving the go-by to the old local courts and making their way to Westminster Hall, to plead there about their petty affairs." (p. 36.)

In the local courts there was local influence, political and personal. "Bribery could do much; seigniorial influence could do more; the sheriff, who was not incorruptible, and had his own likes and dislikes, could do all, since it was for

him to find the jury."[40] The people preferred the courts of the king which were presided over by men of the church, men of detachment and character, and training in the law. The history of the period reveals two facts: men preferred the arbitrament of the law to the use of force for the settlement of disputes; courts presided over by judges of detachment, training, and security of tenure rendered satisfactory service.

Medley in his *English Constitutional History* (pp. 316 et seq.) says that the reasons for the suppression of the local courts and the gradual concentration of justice in the royal courts was to be found in the superior and even justice administered by the royal courts and that it was made possible by three important reforms: the introduction of a new method of procedure by the use of writs and of trial by jury; the regulative influence of the itinerant justices; and the protection afforded by the establishment of the three courts of common law at Westminster. And Plucknett, in his *Concise History of the Common Law*, says:

> "And so, on a broad view, both the oppressions and the rebellions of the period appear as efforts to find and maintain the just mean between private liberty and public order, while through it all, steadily and constantly, proceeds the growth of better and more expert judicial institutions, and the development of more and more rules of law, and their organization into a coherent legal system which already was beginning to separate from the purely administrative machinery of the realm. By the time we reach the second half of Henry III's reign the judiciary is already distinct from the administration and can stand aside while the national leaders in arms assert the necessity of im-

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40. Maitland and Montague, *supra*, p. 650.

posing restraints upon the speed and the direction of so dangerous an engine." (i. e., the power of the Crown).[41]

Today one of the most promising assurances of satisfactory outcome from the world revolution through which we are passing lies in the fact that courts of Anglo-Saxon origin,—wherever they are, in England, in America, in Australia, in India, in Africa,—can still stand aside and hold the confidence while the economic and political reforms for world order are perfected. In England, now in the throes of her post-war adjustments, one of her best informed scholars, Professor Hugh Last, can say:

> "There are tendencies about which bode trouble—not because the people who show them are evil but because they don't understand the fundamental facts of their own civilization. But our judicial system is still, I rejoice to believe, as sound as ever; and it has not been even criticized, let alone attacked."

And another competent critic can say:

> "A free parliament, a free press, a legal system and courts of law which have always upheld the rights of private citizens against arbitrary power supply an institutional framework which will not easily admit the despotism of the state." [42]

MIDDLE AGES

The concentration of justice in the king's court which was established by Henry II was maintained during the reigns of Richard and Henry III. Richard was absent

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41. Medley, D. J., "English Constitutional History", pp. 316 et seq.

42. Woodward, E. L., "Middle England", 25 *Foreign Affairs*, No. 3, p. 385.

from the country during most of his reign and the country was governed by justiciars, men trained under Henry II. At that time it became the practice to keep an official record of the business done in the king's court. The earliest judicial records come from the year 1194. Thereafter men of the law had the means of knowing accurately what cases had come before the king's justices and how they had been decided. The doctrine of *stare decisis* began to develop.

King John's quarrels with the church and with the barons led directly to the signing of Magna Charta. That great charter has been referred to as the beginning of English statute law, but in most instances the law which it stated was not new law. It represented the established practice. The insistence that forced the signing of the Charter by King John was not that the law be altered but that it should be observed by the king. The document goes into much detail, but its overall effect is to guarantee to England a reign of law.[43] The detail of the document that is of vital importance in this study is the provision that the great court of common pleas should no longer follow the Crown but should "be held in some certain place". Thus was driven the first wedge for the separation of the judicial from the executive function of government.

The court of common pleas had been created by order of the king out of the itinerant justices. He had appointed five judges and had ordered that they should "not depart from the king's court but remain there to hear the pleas and complaints." He further ordered that if any question should arise among them which they could not solve, they were to bring it up in the royal hearing for determination according

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43. Maitland, *supra*, p. 15; Sabine, *supra*, p. 219.

to the pleasure of the king and the wiser men of the realm. Magna Charta separated the court of common pleas from the person of the king, and as a result it obtained a permanent location at Westminster. But the appeal from the court of common pleas to the king and his council still remained. Moreover there were still causes which were not *common* pleas. These pleas of the Crown or "matters particularly touching the king" had to be referred directly to the king or to someone authorized by the king to hear them. The volume of such business occasioned the appointment of "The Justices Assigned for the Holding of Pleas before the King Himself." This court became known as King's Bench.

The third great court of Westminster was the court of equity. It came into existence to take care of the legal work which had accumulated in the Exchequer and the Chancery. Legal administration in England had from the beginning been intimately associated with the collection of the king's revenues. Causes affecting the king's revenues had been delegated to the Chancellor and Barons of the Exchequer who had been appointed to take care of this growing business. The judges of the other courts and the Chancellor and Barons of the Exchequer frequently met for discussion of special causes. The place of such meetings came to be known as the Exchequer Chamber or Chancery and the Chancellor presided at such conferences. He had long been authorized to issue writs, granting permission to file suits in the king's courts, and his powers had been increased by custom and legislation. While at first there was opposition to the jurisdiction of the Chancery and some conflict between it and the jurisdiction of the other courts, in time such opposition and conflict disappeared and the business

of the Chancery was taken over by a permanent court of equity.[44]

In all systems of law there has been a tendency for legal procedure to crystallize into certain set forms and formalities. The administration of the law then becomes involved in technicalities. With the change of times and conditions of life injustices and wrongs occur for which there are no legal remedies in the formalized procedure. Man's innate sense of justice and the good order of society then require an expansion of legal procedure to meet the new conditions. This was accomplished in Rome by the Praetor's Edict. When the system of writs of the common law courts of England was inadequate, aggrieved subjects naturally turned to the Chancellor for relief. That office, too, was presided over by men of the church trained in the civil law. They quite naturally turned to the Roman and canon law for remedies and methods of procedure. Because the Chancery supplied a very common need, its jurisdiction was welcomed and this equitable tribunal took its place with the Courts of Common Pleas and Kings Bench as a part of the legal system of the land. In time the two separate systems of law and equity became fused and the same judges administered both legal and equitable principles. As Dean Pound says: "The law was liberalized but it was still the common law."[45]

As we have seen, these courts were at first engaged in administrative as well as judicial duties. But by the time of Edward I they had become separate institutions con-

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44. Plucknett, *supra*, pp. 128, 135, 145, 162, 169; Maitland and Montague, *supra*, pp. 99-101.

45. Pound, Roscoe, "The Spirit of the Common Law", p. 73, Boston, Marshall, Jones Co., 1921.

cerned exclusively with judicial work. The judges, however, were still appointed by and served at the pleasure of the king. But as to private law they were quite free to develop what came to be known as the common law. The basis of English law was not created by legislation but was chiefly evolved in the courts. The justices, as we have seen, were mostly ecclesiastics, men trained in the canon law and the Roman law. Although they were dealing with Anglo-Saxon and feudal law, they were given a free hand in molding it to new needs. They could invent new remedies to meet new cases. *Maitland* (*supra*, p. 18) says:

> "We may indeed regard the reign of Henry III as a golden age of judge-made law; the king's court is rapidly becoming the regular court for all causes of any great importance, except those which belong to the ecclesiastical courts, and as yet the judges are not hampered by many statutes or by the jealousy of a Parliament which will neither amend the law nor suffer others to amend it. Also we now hear very little of local customs deviating from the common law; as the old local courts give way before the rising power of the king's court, so local customs give way to the common law. The king's court gains in power and influence because its procedure is more summary, more rational, more modern than the procedure of the local courts. Their procedure is never improved, it remains archaic; meanwhile the royal court is introducing trial by jury; all the older modes of trial are giving away before this new mode. In 1215 the Lateran Council forbade the clergy any longer to take part in the ordeal. In England the ordeal was at once abolished, and the whole province of the criminal law was thus thrown open to trial by jury."

Reforms which had to be brought about on the Continent by violent revolution were effected in England by processes of law through the courts. The majority of the populace

who had been serfs, gradually acquired economic independence. Lords of manors were forced to concede to their peasants the benefits of ownership in their holdings. Through the influence of custom which was first recognized in courts of equity the feudal villeins became property owners and their rights finally received the protection of the common law courts.[46]

During the reign of Edward I, who has rather ineptly been referred to as the English Justinian, much of the law of the land became crystallized in statutes. Lawyers and judges then ceased to study the Roman law because the law which they were administering was largely found in legislation. The growth of the law thereafter is much slower because of the insistence that changes in the law should not be made without the consent of Parliament. At that time ecclesiastics ceased to sit in the royal courts, and the courts were presided over thereafter by men trained in the law of England.[47]

When the active influence of the churchmen was removed from the courts of England a strong professional influence took its place. That professional influence was created and maintained by the Inns of Court. Those Inns played an important role in English history. They were brought into existence by three events: the Pope had prohibited the clergy from teaching the common law; King Henry III prohibited the holding of schools of law in the City of London; Magna Charta had separated the court of common pleas from the king's person. The court was thereafter permanently established at Westminster and the lawyers and judges during term time took up their abode in that

46. Plucknett, *supra*, p. 33.
47. Maitland, *supra*, p. 21.

vicinity. The lawyers and judges became teachers of the law, and students of the law came to live in the same neighborhood.

The hostelries of the village were insufficient, and the judges, serjeants, students, and teachers of law gathered into groups and established inns for their own accommodation. This concentration of life in and around the courts naturally engendered a strong professional feeling. The judges of the courts without any definite enactment or grant of authority assumed and were conceded the control and discipline of the life at the Inns. They licensed those who were qualified to practice law.

Thus when the courts became separated from the church, they still were presided over by men of special training and experience in the law and for the most part by men who had devoted their lives to the service of the law under a code of professional standards and principles. The respect of English-speaking people for law has frequently been remarked. It is no doubt due to the fact that the administration of the law was made and kept respectable. The source of that attitude for six hundred years was the Inns of Court. There the law was studied, there the great classics of Anglo-Saxon jurisprudence were written, and there men were rigorously disciplined for legal administration and interpretation. By Blackstone's time the Inns of Court were referred to as "our judicial university."

It is apparent, however, from our examination that the earliest development of the courts of England was largely under the influence of men of the church. They were men of strong character and great learning and, because of their offices in the church,—they were bishops, deacons, archdeacons, clerks,—they enjoyed positions of detachment and

comparative security of tenure. It was they who had set the standards for the Inns of Court.

Before leaving the formative period of the common law and the effect of the judiciary on private law, the influence of that period on the public law should be noted. During the Middle Ages the interest of the churchmen in the Roman law had inspired an investigation of the classical sources of that law. Schools were established at Bologna and Ravenna and the activity there had spread to other centers, like Pavia and Oxford. This activity brought the influence of classic humanism and Christian ethics together and applied their combined force to the formation of legal concepts, policies of government, and the theory of the state. The great minds of the Middle Ages devoted their powers to the examination of the nature of kingship, the authority of the law, and the limits which ought to be put upon the power of temporal rulers. The state was criticised in terms of the ideals of a universal church.[48]

This civilizing influence was made effective in England through such characters as Hubert Walter and Stephen Langton. Walter was the Archbishop who, assisted by the great Council of Magnates, ruled during the absence of Richard. So great was his influence that King John complained against his usurpation of power. Historians of the period inform us that "Hubert Walter held the view, natural in an ecclesiastical statesman, that the kingship was an office invested with solemn duties. Royal power must be inseparable from the law."[49] And Stephen Langton, who served under King John, held that "Loyalty was devotion, not to a man, but to a system of law and order which he be-

48. Plucknett, *supra*, p. 14.
49. Powicke, F. M., in 6 C. Med. H.

lieved to be a reflection of the law and order of the universe." He was devoted to "those principles of harmony in life and nature which underlay all the current belief in justice and responsibility." This doctrine of limited government found support also in the feudal law. The tenant and the landlord owed mutual responsibilities, and the king as over-lord of all the land also had duties and obligations which were a definite part of the system by which he claimed his title.[50]

That theory of jurisprudence had a beneficial effect. Plucknett says (p. 21):

> "The rapid growth of the central administration and the development of the courts of law was only equaled by the growth of local government, of burroughs, of trade both internal and foreign, and the close co-operation of central and local authorities. Litigation, negotiations, compromises definitions of official power, the statement of precise limits to all sorts of jurisdictions public and private, organization between groups of towns and the elaboration of machinery for holding international chapters in certain religious bodies,—these are all signs of the spirit of legal order which filled the opening years of the 13th century."

It is natural that such a revival of learning in law should produce a great law book. Sometime between 1250 and 1260 Henry of Bratton, or Bracton, as he was commonly called, wrote his treatise on the laws of England. He also was an ecclesiastic, an Arch-Deacon, but he had served for twenty years as a judge. There had been earlier works, such as Glanvil's book on English law, but Bracton was the first to set men thinking seriously and rationally of English

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50. Pound, *supra*, pp. 68, 78; Sabine, *supra*, p. 221.

law as a whole, to represent it as an organized body of connected principles. When the final struggle came for the independence of the courts from the domination of the Crown, it was from Bracton's book that Lord Coke quoted when he told James that the King was under God and the Law.[51]

As Plucknett says:

> "Such is the subject-matter of legal history in the Middle Ages where we can follow the rise and progress of law and the rule of law. When we come to Machiavelli, we reach the spirit of the Renaissance and begin to find law itself questioned, for his distinction between public and private morality is essentially the same heresy as to divide the substance of the Godhead; a double standard introduces a sort of polytheism utterly repugnant to medieval thought. And, true enough, there soon came the State, as a sort of anti-Christ, to wage war with the idea of law. The issue of this conflict is perhaps still uncertain, but medieval thought is today fighting hard for the cause of law against the amoral, irresponsible State." (Plucknett, *supra*, p. 40).

It was during the Middle Ages that we first find an exposition of the idea of government limited by law, the acts of the state itself subject to judicial review.[52] The implementation of that doctrine was forged and formed in the independent courts of England. "There", Dean Pound says, "the establishment of strong central courts, purporting to administer the common custom of the whole realm, the strong central administrative power of the king, and the

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51. Sabine, *supra*, pp. 450, 451.

52. McIlwain, C. H., "The Growth of Political Thought in the West," pp. 328, 329, 330, n. 1, New York, Macmillan, 1932; Dodge, W. P., "Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty", A. B. A. Journal, Vol. 33, p. 1013.

early formulations of the feudal duties of the king toward his tenants in chief afforded a unique opportunity for the evolution of a legal doctrine of the legal duties and responsibilities of those who wield governmental powers." [53] It was due to such implementation of that doctrine that Sir John Fortescue, C. J., when he wrote his work *In Praise of the English Law* (*De Laudibus Legum Angliae*) in the Fifteenth Century, could with pride contrast the constitutional kingship of England with the absolute monarchy of France.[54]

In summarizing the processes by which the common law of England came to transcend local custom and royal despotism, Maitland and Montague quote Sir Frederick Pollock as follows:

> "As time went on the popular courts faded into insignificance, then into oblivion; the name and functions of the ancient Doomsmen vanished, and the law was delivered in the king's courts by the king's justices. . . . An impartial observer of the 13th Century might well have expected . . . the king's judges to regard themselves and to be regarded as mere exponents of the king's will, and to prefer the interests of the Crown to all other considerations. But it fell out quite otherwise. Professional tradition and public spirit were too strong for royal influence. As early as the 13th Century the judges were servants of the law first and the king afterwards.
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> Certainly the power of the king's judges, a compact body of learned persons directly representing the king's authority, was very great. . . . No less certainly the judicial power was used with great freedom to repress diversity of local customs and establish uniform rules as far as the jurisdiction of the king's courts extended. But the courts were really doing the work of the ancient

53. Pound, *supra*, p. 66.
54. Maitland and Montague, *supra*, p. 112.

tradition, inasmuch as the uniformity which they established was not according to the king's pleasure, but according to law, and was far more capable of resisting executive interference than the customs which it superseded. If rival provincial customs had been allowed to take defined form, they might have invited an overruling despot. The custom of the realm was another matter.

A further development, already foreseen in the 13th Century and settled beyond question in the 15th, is that which gives our jurisprudence its most peculiar and striking character. Judicial interpretation of the law is the only authentic interpretation. So far as the particular case is concerned this may seem an obvious matter. Positively, the court is there for the purpose of deciding, and has to arrive at the decision. Negatively, no other authority has any right to interfere with a court of justice acting within its competence; this is perhaps not quite so obvious, but may be supposed to be the rule in all or very nearly all civilized jurisdictions. But the common law goes much beyond this immediate respect for judicial authority. The judgment looks forward as well as backward. It not only ends the strife of the parties but lays down the law for similar cases in the future. . . . Laymen sometimes talk of judge-made law as if judges were legislators and could lay down any rule they chose. It is needless to explain to a legal audience that this is not so. Judges are indeed bound to find some rule for deciding every case that comes before them, but they must do it without contradicting established principles, and in conformity with the reasons on which previous decisions were founded. They may supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require; but they must not reverse what has been settled. Only express legislation can do that. . . . Henry III's and Edward I's judges . . . had many new cases and little record authority, and were almost compelled to be original. But they certainly intended to be consistent and were aware that their judgments were

regarded as fixing the law. . . . It is also to be considered that the king's courts, as their functions became defined, had to regulate their own procedure if there was to be any order at all in their business; and that, in a state of government where both law and procedure are new, it is hard to draw an exact line between them, or to provide for urgent matters of procedure without determining the bent of the law itself.

Thus the king's courts were driven, in more than one way, to be self-sufficient. Willing or not, they would still have had to make their own practice, and in doing so they could not help making a good deal of law." [55]

The accomplishment of the judicial function under the direction of the early English courts bears vitally important lessons for our day. The present tendency toward absolute democracy and incompetence, the disintegrating effect of our factionalism, our popular and demagogic disparagement of judges and courts might all be put to shame by a fair consideration of the accomplishments of early English courts. We should not, however, expect to find that all the judges of that period were perfect. They were not and their imperfections affected their administration, but as Pollock and Maitland say in their *History of English Law:* "Though we hear some stories of corrupt and partial judges, it is plain that this powerful central tribunal must have been well trusted by the nation at large. Rich and poor alike would go to it if they could." [56]

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55. Maitland and Montague, *supra*, p. 83 (with some omissions). (For a philosophical discussion of this creative function of courts, see Cardozo, B. N., *The Growth of the Law*, p. 56 et seq.)

56. Maitland and Montague, *supra*, p. 81.

IRON AGE

When the Tudor and Stuart monarchs asserted their despotic power over the administration of the law, the courts had a hard time to maintain judicial independence. Those monarchs were determined to direct law enforcement by summary procedure. Judicial offices were therefore given to those who would support the royal designs, and judicial tenure became dependent on subservience to the wishes of the Crown. John M. Zane refers to this Tudor-Stuart period as "The Iron Age, the saddest in the history of the law." The lust of Henry VIII, the jealousy of Elizabeth, and the bigotry of Mary had no respect or patience for judges of independent character.

There were, however, judges who withstood the temptations and the oppressions of the time. Sir Thomas More and Sir Edward Coke are notable instances. During the whole period of the Tudor and Stuart reigns therefore the administration of the common law continued to develop. The evil influence of the Crown, like that of the Roman emperors, was largely confined to trials involving political or Crown issues. As between one private citizen and another there was no incentive to interfere and the law was permitted to work toward even-handed justice. The courts of general jurisdiction indeed had developed such an independent character and devotion to the common law that by the time of James I they could openly oppose the procedures of the High Commission, the Court of Requests, and the Star Chamber.[57]

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57. (For the history of a struggle in our own time against a similar assertion of arbitrary power, see *New Instruments of Public Power*, by The Honorable Joseph C. Hutcheson, Jr., California Bar Association, 1946.)

When the Court of High Commission, in accordance with the king's notion that his will was absolute law, began to arrest men without formal charge or indictment, imprison them without hearing, try them without fixed rules of procedure, and give judgment without right of appeal, Lord Coke and the other judges of the court of common pleas ruled that the High Commission had no such power in law. They repeatedly issued writs of prohibition against the usurpation of such power. When King James issued proclamations to amend and supplement the legislation of the day, the common law courts refused to recognize such proclamations as the law of the land. And when the king issued orders to the judges to delay proceedings in certain cases in which he was interested until they had consulted him and obtained his views and wishes, the judges refused to concede such power to the Crown. Coke expressed the proper judicial attitude in his heroic statement that "When the case happens, I shall do that which shall be fit for a judge to do."

Coke was not permitted to retain his office for long. He was deposed and was sentenced to the Tower. But the people of England supported the independence of the courts against the usurpation of the Crown. The common law had grown so much stronger than the sovereign will in the affections of Englishmen that they ultimately sustained the contentions of the Chief Justice. What Coke had been deposed for asserting, King Charles was beheaded for denying. With the removal of the last of the Stuarts the independence of the judicial officers was established. From that time judges held their offices during good behavior instead of at the pleasure of the Crown. Since the Revolu-

tion of 1688 there has not been a removal of a judge by executive order.[58]

The importance of an independent judiciary had become so indelibly impressed upon English minds everywhere that when the framers of our Constitution came to provide for the judicial function in the basic charter of our government, they said:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme court and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." (Article III, Sec. I.)

The men who gave us our government—and a more worthy group of profound and practical philosophers was never assembled—when they came to consider the judicial function of government, delivered it entirely into the control of independent courts. The prior history of all governments prompted that action: and the subsequent history of this nation justifies that action.

SUMMARY

The three formative periods of the common law are: (1) the 12th and 13th centuries; (2) the 16th and 17th centuries; and (3) the period of legal development in the United States that came to an end with the Civil War, "the period", according to Dean Pound, "that some day, when the history of the common law as a law of the world comes

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58. Wilkin, Robert N., "The Spirit of the Legal Profession", p. 76, Yale U. Press 1938.

to be written, will be regarded as no less classical than the first." [59]

It would be interesting to trace the history of the judicial function through each of those periods. It would show beyond all question that the law was most efficiently administered and the public welfare best conserved by independent courts presided over by men of secure tenure who were especially prepared for the work. In other words, the evolution of the judicial function reached its highest attainment under men who were qualified for the work and who were detached from all other influences, royal, political, or commercial. It is in that attainment that the Anglo-Saxon contribution transcended the Greek and the Roman. It constitutes the high-water mark of man's political evolution.

Limitations do not permit a detailed study of the judicial function during the two later periods. Nor is it necessary for our present purposes. We have outlined in considerable detail its development during the earliest and most important period. We say "most important" because during that period the foundation was laid for all that followed. It was during that period that "the three distinctively characteristic institutions of the Anglo-American legal system" were established—(1) the doctrine of judicial precedent; (2) trial by jury; and (3) the doctrine of the supremacy of law.[60] These institutions were established, it should be noted, not by legislation, nor by plebiscite, nor by exercise of any arbitrary will. They were brought into existence and maintained through the exercise of the judicial function as it applied to individual cases in accordance with a doctrine that all legal institutions and all legal rules

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59. Pound, *supra*, p. 41.
60. Pound, *supra*, p. 65.

were to be measured by reason, checked by experience, and inspired by ethical judgment.[61] The doctrine of the supremacy of law did not mean that the courts should stand always against the sovereign will or against the popular will. The judges of the courts co-operated with the Sovereign as long as the influence of the Crown supported the national interest, and opposed the Sovereign when his policies were against the commonweal. The effect of the judicial function properly exercised was to sustain the ultimate and more important social interests as against the more immediately pressing but less weighty interests of the moment by which mere will unrestrained by reason was likely to be swayed.

Due to that policy and constructive legal statesmanship, equity jurisdiction, with its liberalizing influence, the Law Merchant and Maritime law, with their international scope and effect, could all be fused into the English legal system, and such serviceable instruments as the writs of habeas corpus, quo warranto, mandamus, prohibition, and certiorari, could be developed. All the rules which are now the guaranty of individual freedom and which recognize the dignity of personality were forged in the early English courts. The condemnation of forced confessions, the right to confront witnesses, to compel the attendance of witnesses, to have counsel, the doctrines of due process and day in court, all come from Anglo-Saxon tribunals. It was quite natural that one of such courts should in time be able to hold that England was so devoted to freedom that as soon as a slave set foot on English soil he was freed.

Freedom does not grow on trees, nor does it descend like manna from heaven. It is the work of informed and devoted minds. It is not the mere absence of restraint. That

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61. Babbitt, *supra*, pp. 40, 110, 180, 198.

is anarchy, and anarchy does not produce freedom. Freedom exists in and is maintained by the law properly administered. We talk of democracy, but in last analysis the thing that affords us our freedom and our way of life is constitutionalism. Constitutionalism protects the minority against the majority and makes the judicial function available to the citizen against the state itself. Constitutionalism is government limited by law. And government limited by law requires a strong and independent judiciary for the maintenance of law.

Professor McIlwain, in order to portray the two essential functions of government which constitutionalism keeps in balance, adopts the two Latin words which were used by Bracton at the inception of our political and legal history: they are *gubernaculum* and *jurisdictio*, the power of government and the limitation of law. The power of government must be maintained if government is to meet the needs of modern times. Such power must be co-extensive with the requirements of social welfare. But still the safeguards of liberty against arbitrary government must be maintained through the ancient legal limitations. Professor McIlwain says: "The proper remedy for the abuse of 'reasons of state' has never consisted and does not now consist in making the government incompetent. Our past constitutional history seems to show that it consists of a *jurisdictio* under the protection of an independent court, coupled with a *gubernaculum* strong enough to perform all its essential duties and obvious enough to insure full responsibility to all the people for the faithfulness of that performance." But he also says: "If *jurisdictio* is essential to liberty, and *jurisdictio* is a thing of the law, it is the law that must be maintained against arbitrary will. And the one institution above all others essential to preservation of the law has al-

ways been and still is an honest, able, learned, independen judiciary." [62]

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62. McIlwain, C. H., *Constitutionalism*, pp. 144, 147, New York Cornell University Press, 1940.

II

Industrial Disputes—Their Settlement by Judicial Process

Prelude and Prospect

We have wars and strikes because we have not yet subjected such activities to lawful control. In order to bring them into control it is natural to suggest that they be subjected to the same legal processes as have been applied to other uncivil tendencies. The first step in that direction is to inquire why such matters should not be amenable to the judicial function. Is there any reason in human history why the grievances that occasion strikes and wars should not be submitted to such tribunals as in the past and in other fields have served to maintain order? Is there anything in the nature or position of those who make wars and strikes that surmounts and overrides the community interest in peace?

As to wars there is a major difficulty which does not apply to strikes. Wars are usually between sovereign nations, and national sovereignty in the international field arrogates a position above the law. Until that unreal assumption is dispelled by an acceptance of the facts, until the immoral fiction of national sovereignty in that field is dissolved in sound reason and good conscience, there is little possibility of avoiding wars.

But strikes are domestic problems. They call for no renouncement of sovereignty, but rather for the exercise of sovereignty in its proper field. Our difficulties arise from the fact that national sovereignty is asserted where it does not and cannot exist and is abandoned where it should be asserted.

True sovereignty exists in the law. That is so, and i cannot be otherwise, because the world is made that way Men are amenable to law because of their nature as rational social, and moral beings; they cannot with impunity dis obey the law. The extent to which men have realized free dom and civilization is measured by the extent to whic they have ordered their lives according to universal law— the law of physics, the law of chemistry, the law of eco nomics, the law of their social nature. When we fail to orde our social life according to civil law we have barbarism an anarchy. We have suffered international anarchy abroa because no world agency has been created with authorit to exercise the sovereignty of law. And we suffer economi anarchy at home because the governmental agencies whic have been created have failed to exercise the sovereignt of law in that field.

From earliest times, as we have seen in I above, th chief object of civil organization and the exercise of civ authority (sovereignty) has been to preserve the peace an public welfare; the highest development of political evolu tion is found in constitutionalism, the chief aim of whic has been to substitute law for force, rational judgment fc arbitrary will. In order to keep political authority respor sive to reason and devoted to the public welfare, constitu tionalism provides for representative government. The se lection of policy-making officers and the determination c political disputes are by majority vote (free elections), an the settlement of legal disputes by judicial process (court of law).

Constitutionalism is not perfect, and never will be whi administered by erring humans; but it is the best approac to the golden mean between despotism and anarchy. avoids the evils of dictatorship and totalitarianism on or

side, and of ochlocracy or mob rule on the other side. It affords a balance between social cooperation and competitive self-assertion. It permits organized effort for the commonweal while preserving freedom of individual initiative. The balance of constitutionalism is, however, very difficult to maintain. The forces of life impel to right and to left, and counter-action begets reaction in the opposite direction. The only way to maintain the balance is to maintain a government which exercises both *gubernaculum* and *jurisdictio* (power and restraint)—a government competent to preserve and enforce against conflicting persons and classes the sovereignty of law.

RETROSPECT

At common law strikes and lockouts were treated as conspiracies. A conspiracy was a combination of persons to accomplish an unlawful purpose or any purpose by unlawful means. It was both a civil and a criminal offense prior to any legislative enactments. Later English statutes were expressive of the common law. The offense became a part of the law of this country in all jurisdictions where the common law and early English statutes were accepted as the common law of the New World.

The law of conspiracy prohibited combinations for any of the following purposes: to induce others to violate the law; to extort money; to defraud; to violate morality or decency; to injure trade or commerce; to hinder execution of law; to injure reputation; to injure property, business or calling; to prevent competition at auction; to prevent laborers from working; to induce breach of contract, etc.[1] The law applied both to employers and to employees, and

1. 15 Cor. Jur. Secundum, pp. 994, 997, 1024, 1056.

therefore operated against blacklists, boycotts, lockouts, and strikes.

If we bear in mind that the original reaction of organized society was definitely against such combinations, some claims which are asserted today as absolute rights, such as "the right to strike", are then seen to have no basis whatever in history. It can be said with assurance that the interest of society in the preservation of peace and the general welfare has always been, and must always be, paramount to the claims and contentions of parties to labor disputes.[2]

As the evolution of business produced corporations, mergers, and associations, the power of such concentrated capital called forth a counter-balancing effort by labor. United employers naturally produced united employees. The concentration of economic power produced industrial imperialism, and then the commonweal, the community interest, required measures for the protection of laborers. Courts, not legislatures, first recognized the right of em-

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2. Doughty, William Howard, Jr., Emeritus Professor of Political Science at Williams College. Letter to the *New York Times*, January 31, 1946: "The Welfare and the interests of the public are paramount, and it is the duty of those in public office to insure them."

Knox, John C., Judge, U. S. District Court, New York. Address reported in *New York Sun*, March 2, 1946: "I don't subscribe to the idea that the rights of labor are superior to those of the public. In my judgment both capital and labor should be required to subject themselves to the rigors of law and order and to the preservation of the public welfare."

Ewing, A. C., "The Individual, the State, and World Government", Chap. II. New York, Macmillan, 1947.

MacIver, R. M., "The Web of Government", p. 204, New York, Macmillan, 1947.

ployees to do collective bargaining.[3] But in spite of the liberal attitude of such courts, the general effect of early decisions was against the efforts of employees to counterbalance the power of employers. This was so because strikers so often resorted to violence, and the courts, as guardians of the peace, were required to issue injunctions against the use of force. The Congress and the legislatures of many of the states instead of passing statutes to encourage unions and restrain economic coercion, merely enacted measures to restrict the power of courts to grant injunctions.[4] The emphasis of that era was on freedom of enterprise and sanctity of contract. But instead of enlarging the power of labor to organize and bargain collectively, or instead of forbidding exploitation by employers, an easier course was followed; laws were passed to decrease the power of the courts. A brief survey of subsequent developments reveals that such policy left government and society impotent.

SUBSEQUENT TRENDS

During the depression which began in 1929 the effect of enactments, decisions, and administrative orders was altogether in favor of unionism.[5] Social, economic, and political conditions accentuated the trend. The political party in control of national affairs after 1932 had promised relief for "the forgotten man",—and most men at that time felt

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3. *Commonwealth* v. *John Hunt*, et al., 4 Metcalf 111 (Mass.). Landis: Cases on Labor Law, p. 32.

4. Norris-LaGuardia Act, Title 29 U. S. C., Secs. 101-115. Clayton Act . . . 29 U. S. C., Sec. 52.

5. Ives, C. P. "The Cure Is Simple Equality before the Law." *The Baltimore Sun*, April 1, 1946. A review of labor policy in the post-1933 years.

they were in that class. The economic collapse was so general that managers of business admitted they were unable to deal with it. Executives who had acclaimed *"laissez-faire"*, "free enterprise", and "rugged individualism", and had opposed all attempts to regulate monopolistic and imperialistic practices, then appealed to the government for help. The government established a public works program and made grants in aid to increase employment. Such grants all contained conditions favorable to labor. Legislation was enacted to encourage or compel the unionization of all employees. The theory was that strong unions would counter-act the monopolistic powers of employers.

At that time the teaching of Karl Marx had gained a surprising influence in Washington. Its doctrines had been infiltrating for some time from different levels—through the "intelligentsia" and the instigators, the dispossessed, and the "parlor pinks". Its progress, moreover, had been furthered by preachers, teachers, and others who, offended by the arrogance of industrialism and attracted by the economic theories of Marxism, did not know or did not care what its effect would be on our political institutions.[6]

Under the doctrine of Emergency powers the depression was used to the fullest extent by all who wished to extend the authority or activity of government. Economic and political theories were openly advocated and widely accepted which a decade before would have been anathema in this country. Principles of government which had been considered fundamental here were openly flouted. The fiat

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6. The Marxists have never offered a constructive philosophy of government to replace what their revolution seeks to destroy. In fact Marxism, as Prof. Sabine has said, is not so much a philosophy as a ferment. "History of Political Theory", pp. 712, 715.

rule of administrative boards was defended on the theory that it was more direct and efficient. The Constitution was considered antiquated. The movement culminated in the National Labor Relations Act, the National Labor Relations Board, and decisions exempting labor-union activities from the Anti-trust Act, the Anti-Kick-back Act, the income tax, and laws against violence and other abuses.[7]

The National Labor Relations Act was conceded to be legislation in the interest of a special class, but was defended on the ground of social need. While its purpose to establish a better bargaining basis and to prohibit coercion and exploitation was commendable, its provisions for attaining such objects were so one-sided, so contrary to principles of constitutional government, that impartial observers generally deplored and opposed its enactment. In operation it carried administrative abuses to extreme and perverted the judicial function. The only appeal which it allowed was directed to the U. S. Circuit Court of Appeals. It denied resort to the ordinary and more accessible trial courts. The first act of communism or of fascism or of any other form of despotism is always to delimit the judicial power of constitutional government.

The hearings and orders of the Labor Board were so contrary to the American notion of even-handed justice, the conduct of its agents in the field was so arbitrary, abusive, and so definitely in the interest of a specific union, that the result was not a reform but a crusade. The Board

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7. Miller, Byron A., Judge, Philadelphia Common Pleas Court. *New York Times*, April 13, 1946: "Labor has become a favorite of the law . . . The Sherman Anti-Trust Act, the Anti-Kick-back Act, the federal Income Tax Law, and many other laws which apply to the public in general are by law or decision of our federal Supreme Court inapplicable to labor unions."

did not recognize the principle of *stare decisis,* and without the guiding doctrine of precedent it could not create a body of law. Its conflicting decisions therefore afforded no guide for the future. The general effect of its administration was not to establish a just balance but to undermine faith in government. The feeling of impartial citizens was about what it would be if they saw a policeman participating in a street fight in behalf of one of the fighters instead of establishing order.

As a part of this general movement in favor of labor, partisan appointments to the courts were made. Judicial experience was a handicap to preferment. Judges were selected by or from the "powerful group of European-minded radicals, power politicians, and self-professed experts surrounding the President".[8] And again, as always, the effect of partisanship in the judges was a perversion of the judicial function and an undermining of confidence in the courts.[9]

Both legislation and decisions were moreover affected by a definite shift in the philosophy of law. The self-styled "Realists" or "Positivists" gained the ascendancy and then expediency prevailed over principle. Law was thought of as a positive science and the ideals and concepts of natural-law philosophy were abandoned and scoffed at. The social interest (as conceived by those in power) was considered paramount to what had been previously considered as in-

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8. Hutcheson, Joseph C., Jr. (Judge, Fifth Circuit Court of Appeals), "The Instruments of Public Power", p. 5, California Bar Association, 1946.

9. Corwin, E. S., "Total War and the Constitution", pp. 178, 179, New York, Alfred A. Knopf, 1947. But of course the reaction in the Supreme Court was only a part of the total effect of partisanship in the judiciary.

dividual, contractual, or constitutional rights. The idea of law as a check upon the exercise of force was abandoned and law was itself considered as the threat of force or the actual force exerted by government.[10]

The movement went further than even its champions intended.[11] Local officers of law throughout the country, sensing the intention of the national government to favor labor organizations, declined to interfere against the bad practices of labor zealots and racketeers. Flagrant violations of law were condoned or overlooked if committed in connection with any union activity. As a consequence of all this favoritism and indulgence, the power to strike came to be thought of as an absolute right without any limitations in the public interest.

CONSEQUENCES

Taking advantage of this "open season", this release from all legal restraint, the labor movement in many phases developed into the most autocratic and arrogant monopoly that had ever threatened the peace and dignity of the na-

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10. Pound, Roscoe: "Property and Recent Juristic Thought", ABA Journal, December, 1939; "Administrative Law", ABA Journal, November, 1941.

Hutcheson, Joseph C., Jr., *supra*, p. 10.

Babbitt, Irving, "Democracy and Leadership", p. 334.

11. Ives, C. P., *supra:* "By the time of the recent strike wave the post-1933 Administrations' contempt for law and order in labor matters had seeped down to corrupt local police officers in many industrial communities across the land. No longer was even the show of law enforcement maintained against union violence."

Adams, Phelps: "Labor Berserk". New York, *The Sun*.

New York Times editorial, February 10, 1946.

tion. Many labor leaders usurped control of unions and proceeded to manage them by the most arbitrary and oppressive methods. In many instances workmen were released from the coercion of employers only to be delivered to a worse coercion by organizers and labor racketeers. American citizens were subjected to the most appalling indignities, not only by union agents but by over-zealous agents of government. Workmen had to join undemocratic organizations to hold their jobs and businessmen had to submit to union domination in order to retain any interest in their businesses. John C. Knox, a judge of distinguished service in the United States District Court for the Southern District of New York, said:

> "If a member of a labor union dares criticise the leader who calls an unwarranted strike, he is a marked man from that day on. Upon one pretense or another, suspension or expulsion from the Union is likely to be his portion. When this occurs, the worker will be deprived of his job and prevented from getting another. Indeed, luck will be his, if he be not subjected to mayhem and torture. And yet, whatever happens to the worker, he is, from a practical standpoint, without the slightest chance of redress."

As soon as the war was ended the despotic practices of labor leaders were extended not only against employees and employers, but also against government itself, and the common welfare was challenged and flouted by strikes which interrupted the supply of food, fuel, and other essentials of life. Electric and transportation utilities, which were forbidden by law to discontinue their services without governmental permission, were paralyzed on order of union leaders. Western Union employees on strike against the decision of a federal government board were even given

emergency relief at an expedited rate. Taxpayers were thus forced to finance a strike against a government order. And at the same time the Tugboat strike imperilled New York's fuel supply even after the boats had been taken over by the government. In another case which had nothing to do with wages or working conditions, a union threatened to call a strike in electric-generating plants unless the city government took a course of action demanded by the union.[12] The newspapers of February 12 (Lincoln's Birthday) carried headlines announcing: "Strikes Paralyze New York, Philadelphia, and Pittsburgh"; headlines of May 10 said: "Coal Strike is Paralyzing Nation"; and of May 24: "Railroad Strike Ties Up Nation".

Government first failed to restrain the arbitrary practices of business. Then it sought to counter-balance that mistake by indulging labor organizations in similar practices. When the natural crisis came in the struggle between the two great monopolies of capital and labor, it seemed to the common man that government had completely abnegated.

Such faint efforts as the government made were for the most part futile. Even the Smith-Connally Act, passed in the interest of the war effort, proved to be a boon to unions and "a stimulant of strikes rather than a depressant".[13] The efforts of public officials amounted only to temporizing, compromising, and appeasing. Such wheedling tactics are a desecration of the dignity of State. It is disappointing to any American patriot to see the highest executive office used as a trading post by selfish interests, and humiliating

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12. Knox, John C., *supra.*
Adams, Phelps, *supra.*

13. Krock, Arthur: *New York Times,* May 12, 1946; Dorothy Thompson: *Cleveland Plain Dealer,* May 23, 1946.

to consider what a proper exercise of the judicial function can contribute to the solution of the problem. The very fact that it was necessary to put a section in the Act expressly declaring that strikes against the government are unlawful, shows how far we had drifted toward the disintegration of government. The history and the true philosophy of government both show that the claim of right to strike against the state is entirely without foundation. Rights are not absolute, but correlative, and always subordinate to the community interest, of which government is the agent. In former times (prior to 1930) a strike against the government was considered of the nature of insurrection or revolution, if not treason.

The claim of right to use force or coercion against the government has been advanced in the name of democracy, and illustrates the kind of sentimentality that extreme democracy has always tended to engender, and the founding fathers feared. Such a claim is not only against the teaching of social science and political philosophy, it is contrary to the principles of true democracy itself. It springs from the revolutionary doctrines of certain European radicals which were taken up by the radical intelligentsia of this country. It has been completely exposed and refuted by Robert MacIver:

> "Mr. Harold Laski . . . has maintained that the citizen should be free to advocate revolutionary methods against the government. 'He may demand its overthrow by armed force'. But the argument is specious. When an individual in a democratic society approves the resort to force for the furtherance of any cause, or when in pleading this cause he identifies himself with any group or party that accepts this method, he rules himself out from the sufferance of democracy. If men are not content to win their ends by making

> enough converts to turn their cause into the cause of the majority, so that it can legitimately triumph at the polls, they are rejecting the only ground on which, in a democracy, they are entitled to ask for the liberty of their opinions. They want to resort to violence—if necessary—against the opinions of the majority, and they have the effrontery to ask that democracy permit them to marshal their forces to this end. It is a primary duty of every government to maintain order and to prevent not only violence but incitements to violence. In a democracy a group or party may espouse an anti-democratic policy, so long as it dissociates its activity in this respect from any design to use the methods of violence and from any preparations suggestive of that design. And if by its persuasive appeal it should succeed in winning a majority then democracy can do no more than mourn its failure to retain the allegiance of the people. It has lost the foundations of its existence." [18]

The true democratic doctrine is based on a faith in men's reason and justice. Any resort to force, except by the duly authorized agents of government according to due process of law, is an abandonment of that faith and an adoption of the tactics of despots. Such resort to force in the past has always led to dictatorship. In so far as the new labor law supports government not of men but of law, it is in line with our constitutional tradition. It is doubtful, however, whether it has gone far enough in that direction.

THE COMPLETE REMEDY—JUSTICIABILITY

Is there any reason why labor unions and employers should be exempt from the processes of law when all other organizations and persons, including the agencies of gov-

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18. MacIver, *supra*, pp. 220-1.

ernment itself, are subject to the judicial function? Judge Knox has made this pertinent inquiry and offered a definite answer:

> "Is it not possible that we should have labor courts that will be open to any union, to any organization of capital, and to any workingman, who, having a grievance, may obtain the justice to which he or it is rightfully entitled? And, when that court renders its decision, let that decision have the support of constituted authority. Unless such courts be established, the tyrannies of capital and labor—one against the other—will continue. As always, the victims of their tyrannies will be the public and the workingman."

Judge Knox has spoken and written effectively in support of his recommendation.[19] Senator Ferguson of Michigan has also written and spoken constructively on this subject.[20] Senator Ferguson introduced in the Senate a bill "to establish United States Labor Relations Courts and to define their jurisdiction".[21] Many impressive articles on this subject have appeared in current periodicals.[22] Best opinion, however, while it supports judicial determination of such issues, seems to be against the creation of new and

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19. "Labor and the Law", *"American Mercury,* June, 1946.

20. "Why Labor Courts?", *American Magazine,* February, 1947; Congressional Record, January 15, 1947. See also statement which accompanied the introduction of the Ferguson-Smith Bill, Congressional Record, March 19, 1947.

21. S. B. 937—80th Congress, 1st Session.

22. Gerhart, E. C., "Labor Disputes and Their Settlement by Judicial Process", American Bar Association Journal, November, 1946, Vol. 32, pp. 752 et seq.

Vickery, M. A., "Judicial Settlement of Labor Disputes", *Ohio Law Reporter,* March 31, 1947. See also articles re-published in "Federal Regulation of Labor Unions", Garland, 1941 and 1944.

special courts for labor disputes. Thorough students of the problem incline to the view that while it would no doubt be necessary to assign special judges to the hearing of industrial controversies, it would be best to have them submitted to courts which are a part of the regular judicial system of the country. The history of special courts does not inspire the same confidence as that of regular and general courts.[23] Judges of permanent courts of general jurisdiction are more impartial and bring to the problems they consider a broader learning and experience. Furthermore judges of our regular constitutional courts would be more exempt from sinister influence and outside pressure than judges of special courts. Some industrial disputes, however, if referred to the regular courts, might require special procedure.

It must be recognized that all labor controversies are not of the same nature as those with which courts customarily deal. Labor disputes are of two general kinds: (1) those which arise from the interpretation or application of an existing law or agreement or the determination of a past or present fact, and (2) those which involve a difference as to what shall be done in the future, viz., what shall be agreed to be done or paid or required, the latter being usually disputes as to wages and working conditions. As to disputes of the first classification there can be no sound reason for withholding them from courts of ordinary jurisdiction. They raise questions of statutory construction, determination of fact, interpretation of agreements, and the application of rules of law which are the same as in all

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23. Vickery, M. A., "Labor Relations Law: The Ferguson-Smith Bill to Create Labor Courts", American Bar Association Journal, June, 1947, Vol. 33, No. 6, pp. 548 et seq.

other controversies. Such matters have been considered justiciable for hundreds of years and there is nothing in the nature of labor disputes or in the nature of the parties to such disputes which can reasonably exempt them from established court procedures.

Questions of the second kind, however, do not involve matters of legal "right" but problems of "interest". They must be solved largely by the application of economic considerations and business customs and trends, such as apply in cases involving rates and charges by utilities. Questions of this kind have not traditionally been considered justiciable. In times past men were allowed freedom to contract and the economic law of supply and demand controlled prices and wages. There was no public interest to be served by governmental interference. Following the Industrial Revolution and the aggregation of capital and economic power, monopolies developed which disturbed the economic doctrines of Adam Smith and the social philosophy epitomized by the phrase *laissez-faire*. As long as contracts of employment were between individuals the community interest was not affected. When it came to pass, however, that contracts of employment were negotiated by monopolies of capital on one side and monopolies of labor on the other side, the public interest in such contracts became paramount. Such monopolies had the power to stifle the economic life of the community. The history of monopolies is without variation; wherever they have existed they have had to be controlled in the interest of the commonweal.[24]

The settlement of such issues, that is, disputes as to

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24. 41 Corpus Juris, p. 85—IV. Legal Condemnation of Monopolies, and authorities cited.

wages, hours and working conditions, would require special treatment. The federal law might provide that whenever the dispute affects or threatens interstate commerce, any party to the dispute, any party interested, or the Secretary of Commerce or of Labor, might file a complaint in the District Court of the proper District and ask the court, after due notice and hearing, to determine the issues. The law could provide that such cases should be heard by three judges, as appeals from the Interstate Commerce Commission and other boards, or by a judge and two associates qualified by training or experience in such matters. State laws could make similar provision for disputes that threaten the public welfare.

The history of law generally, and the history of the judicial function in particular, reveals that when any dispute or controversy threatened the peace and good order of society it became justiciable. Public necessity is what determines justiciability or adjudicability; and the fact that a dispute was not formerly considered so is not a sound objection. To advance such an objection is merely to say that what has not been done cannot be done, and the whole evolution of mankind refutes it. Let us consider other objections to the jurisdiction of courts over labor disputes.

OBJECTIONS

The three objections most frequently advanced against the proposal to submit labor disputes to judicial procedure are: (1) Such procedure would interfere with freedom of contract; (2) Labor disputes are too complex for judicial procedure; (3) No court could order men to work against their will without violating the 13th Amendment of the Constitution, which forbids involuntary servitude. Full

consideration of such objections, however, shows them to be untenable. Let us consider them in the order named.

(1) The argument for freedom of contract is hardly applicable to the conditions surrounding modern labor relationships. The individual laborer and employer seldom have any contact. Wages and working conditions are determined by the officers of the union and the officers of the corporation or association. The relation of laborer to union leader is much like the old relation of serf to feudal lord. The laborer gives his allegiance in return for protection. Maine, in his study of Ancient Law, said that the progression of societies was from status to contract. (Pp. 164, 165.) But in labor relationships it seems to have reverted to status. The modern laborer is free to change his employment and kind of work. But he has very little if any choice as to wages and conditions of employment after his job is determined. Between the union and the corporation, between two monopolistic organizations, the argument for freedom of contract has little if any persuasive force. As already stated, monopolistic agencies have always been subject to regulation (e. g., rates and charges by utilities). Unregulated monopolies are contrary to the public interest. Such freedom of contract as still exists can be best preserved by submitting irreconcilable disagreements to impartial tribunals. The only other alternative is coercion, and coercion results in domination, and domination ends freedom.

(2) The second objection has no more merit than the first. Labor disputes are not as complex as many other relationships with which courts have dealt successfully. Domestic relations, proceedings for reorganization or dissolution of corporations, patent litigation, anti-trust suits, are as delicate and as involved as labor disputes. Reputable

economists have said repeatedly that if values were established for the factors of production, labor disputes could be settled with mathematical accuracy. If courts were authorized to determine such disputes, they would in the very exercise of the judicial function be required to establish values for the various factors of production. Courts that have determined the compensation to be paid for a lost leg or eye or life might be entrusted to determine the compensation for a day's work. Hearing and determination of such questions would establish precedents which in turn would become rules for decision.

(3) Careful examination also dissolves the third objection. There are numerous instances in which citizens are compelled to render service for the public good. In time of war or great emergency men are drafted into service and such service has never been considered slavery. Laws have existed for a long time which forbid utilities from discontinuing service without governmental consent. Would not the same public policy prohibit a labor union from discontinuing the service of such utilities? No proposal has ever been made to interfere with a laborer's freedom to work where he will, or to stop working when he wishes, provided he acts as an individual. The prohibition recommended would be against conspiracies and combinations. An injunction against threats and coercion by a monopolistic organization is in no way an order for involuntary servitude. The aim of the law would be to keep the channels of trade open for individual liberty of action and the operation of natural economic principles. Courts cannot make men agree, but they can determine what wages and working conditions are fair in existing conditions, and then prohibit strikes and lockouts that interfere with men who wish to accept such wages and conditions. The law as to conspiracies would

apply. The history of jurisprudence proves that when fair and impartial courts are maintained, litigants by and large abide the judgments of the law. Coercion is seldom necessary.[25]

ACCOMPLISHMENT OF COURTS

Such courts as have been empowered to deal with labor-management relations have shown the practicability of such procedure. The experience has not been general or extensive, but as far as it goes it demonstrates the possibilities of the judicial function in that field. In 1894 New Zealand created a Court of Arbitration with power to compel settlements. It has been subjected to repeated amendments, but it is still in existence. In 1904 Australia created the Court of Conciliation and Arbitration with authority to fix wages, hours and working conditions and to compel arbitration of disagreements. After sixteen years of operation the General Secretary of the largest union said, "It is infinitely better than the method of direct action."

In 1928 Sweden established a Labor Court and invested it with jurisdiction over "collective bargaining agreements" and "unfair labor practices". It provided for seven members of the court—two nominees of the Confederation of Labor, two nominees of employers' associations, and three members from the public at large. It was provided with a more expeditious procedure than other civil courts, and has made a commendable record. Before the last World War France created a Court of Arbitration and gave it power

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25. Even the government, after it had taken possession of the Montgomery-Ward property by force of arms, sued for the protection of the District Court.

over disputes arising from collective agreements; but its work was interrupted by the German invasion.

The most notable experiment in this country was the Court of Industrial Relations created by Kansas in 1920. It was really a "noble experiment", but evidently in advance of public opinion. It met with bitter opposition, was declared unconstitutional and in 1925 was repealed. It would undoubtedly receive a more kindly consideration today. The grounds on which it was declared to be unconstitutional have since been held within governmental power.[26]

Undoubtedly these courts could have rendered better service if they had not been special courts for a special purpose, and if they had been presided over by judges of detachment instead of affiliation. Courts made up of partisan members usually divide along lines of interest or previous affiliation. They extend the function of consultation but hardly serve the purpose of adjudication. They act more as arbitration boards; they barter, trade and compromise, but they lack the independence necessary to discover and apply permanent principles. Furthermore they more readily become involved in partisan politics and sinister influence, and their decisions are frequently in conflict with the rulings of other courts on similar points. The history of the judicial function shows repeatedly a necessity to do away with special courts and to merge their jurisdiction in the regular judicial system.[27]

But the worth of the judicial function as to industrial

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26. Vickery, M. A., ABAJ, Vol. 33, No. 6, pp. 548 et seq. *supra.*

27. Pound, Roscoe, "Administrative Law, Its Growth, Procedure and Significance", p. 80, Pittsburgh, University of Pittsburgh Press, 1942.

disputes must not be judged solely by the record of the few special courts that have pioneered in that field. The judicial function must be viewed in its entire historic and philosophic perspective if we are to obtain the maximum benefit of its possibilities.

CONCLUSION

The exercise of the judicial function can make a much greater contribution to industrial peace and prosperity than men generally expect. The history of its evolution, if properly understood, invites a greater reliance in its processes than men have yet shown a willingness to bestow. As Dean Pound says:[28]

> "Law is a practical matter. If we cannot establish a demonstrated universal legal measure of values which everyone will agree to, it does not follow that we must give up and turn society over to unchecked force. There have been centuries of experience of adjusting relations and ordering conduct by law, and we have learned to develop that experience and make use of it in weighing and valuing interests."

It is impossible to draft legislation in advance and in detail for all the exigencies of life. Courts must be relied on to fill in specific provisions and thus supplement general legislative and constitutional law. Professor Perry makes this truth quite clear.[29]

> "If law is to take effect and confer its appropriate benefits, it must be known to those who are required to

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28. Pound, Roscoe, "Social Control Through Law", pp. 108, 109. Yale University Press, New Haven, 1942.

29. Perry, Ralph Barton, "One World in the Making", pp. 128, 129, 130, New York, Current Books, 1945.

obey it and privileged to claim it. It must be formulated, recorded, and promulgated. But there is a gap between the law and the concrete act, and courts are created to fill this gap. There are, no doubt, some cases in which the court has only to compare the act with the law and declare it legal or illegal. But this clerical job is a small part of the judge's function, and makes no demands upon the judge's special attributes.

"The law does not apply directly to the concrete act, because it does not take account of special circumstances. It does not take account of new situations which the original framers of the law could not predict . . .

"In exercising its functions the court makes law. For the law exists in its concrete legalities and illegalities and not in its abstractness. The law *is* what it *means* under specific circumstances and as part of the total legal system. The court, faced with concrete situations, alive to the human relations which the law is designed to render harmonious and co-operating, and being disinterested in its approach, renders the sort of judgments in which the purpose of law is revealed and in which its beneficence is most closely approximated. The court contributes largely to making the law what the law is, and it may contribute more wisely than the jurist by whom the law is formulated, or the statesman by whom it is enacted.

"The judge is not, however, free to make the law what he would like it to be. He starts with the abstract law and has to remain faithful to it so far as it goes. He has to be guided by the framer's intent; he has to follow the path defined by previous decisions, lest the purpose of regularity be defeated. Without continuity and stability man would lack that guarantee of future expectations which is a condition of long-range and organized plans."

The problem which industrial disputes raise is the problem that has always confronted government. It is a prob-

lem of maintaining a balance between order and freedom. Order is necessary for security and freedom is necessary for progress. The equilibrium between those two poles can be maintained only through a system for the administration of justice, and the administration of justice requires an independent tribunal where issues can be determined on that higher, or more profound, plane of existence, where interest is not alone what counts, but where moral qualities are called for, and appealed to, to integrate society. As Eduard Heimann has said: [30]

> "The appropriate reconciliation of freedom and order is not a static equilibrium between freedom and the present order, which it may oppose, but a dynamic equilibrium between freedom and the future order which it helps to bring about . . . For freedom and order are not only opposed to each other; they also depend on each other, in the sense that freedom cannot live one day without order, and order cannot endure without being transformed and refreshed by freedom."

> "Yet", as Dean Pound observes, "the practical work of the courts in adjusting relations and ordering conduct must go on. Legal order cannot stand still until philosophers can agree, as they did in the last century, on an ideal, and the legal profession and the courts can be induced or educated to receive it as authoritative. It cannot stand still until the social order has settled down for a time in a condition of stability in which its jural postulates can be recognized and formulated and the principles derived from them can be received into the authoritative guides to determination of controversies. In the meantime the courts must, as in the past, go on finding out by experience and developing

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30. Heimann, Eduard, "Freedom and Order", p. 234, New York, Chas. Scribner's Sons, 1947.

by reason the modes of adjusting relations and ordering conduct which will give the most effect to the whole scheme of interests with the least friction and the least waste." [31]

Highly respected economic authority has said: "What the nation needs is a theory of the functions performed by the various factors in production and of the determination of the values of their respective services."[32] The established procedures of our jurisprudence would supply such need and would, moreover, afford the best guarantee of rational and conscionable judgment that the social evolution of man has yet been able to devise. Courts would develop general formulas for wages in basic industries and schedules of comparison for other industries, and in time there would be established methods of adjustments based on statistics of production, costs, sales, labor supply, and other economic data. Economists have pointed out that if certain principles were accepted, most labor disputes could be settled with mathematical accuracy. Certain it is that courts could be more scientific about decisions in that field than are the present methods of settling labor disputes. Such controversies must be lifted out of intimidation and coercion, and divorced from sinister political influence, if standards of comparison and fixed principles of decision are ever to be established.

The contribution of our judicial system to liberty and security has been too great to be abandoned or neglected. Courts do not deserve and should no longer be subjected to the cynicism and contempt which demagogues and leaders

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31. Pound, Roscoe, "Social Control Through Law", pp. 133, 134, *supra*.

32. Haney, Lewis L., Washington Labor Management Conference.

of blocs and factions have been arrogantly voicing. The accomplishments of bureaucratic agencies in the judicial field do not recommend them as a substitute for courts of law. Short-cuts to justice have generally been blind alleys. Men cannot with impunity abandon the experience of their predecessors. Two thousand years ago Cicero said that the maintenance of peace by process of law was the only decent procedure for civilized beings. It is inexplicable that an observation made so long ago, so patently true, so generally accepted in theory, so satisfactory in practice, should still be considered impossible for world affairs and labor disputes.

III

International Disputes and The Judicial Function

The Problem

What may reasonably be expected of the judicial function with reference to international disputes? What use of it in world affairs is indicated by our study of its history and evolution?

In his recent discussion of *The International Problem of Governing Mankind,* Philip C. Jessup, Professor of International Law and Diplomacy, Columbia University, has asked:

> "With all of our highly developed governmental processes and national unity, we have not been ready to impose general compulsory processes for the settlement of labor disputes. Is it then surprising that the far less cohesive world community has failed to reach that stage in the adjustment of disputes between different groups and peoples?" [1]

We have seen, however, in II above, that it is necessary to make labor disputes amenable to judicial process if we are to have industrial peace. It is even more imperative to make the maximum use of that process for the settlement of international disputes because the failure to maintain peace in that field will be so much more disastrous.

1. Jessup, P. C., "The International Problem of Governing Mankind", p. 30. Published by Claremont College, Cal., 1947.

Science has brought the destructiveness and horror of war to the point where it cannot be endured and therefore dare not be risked.

Our study of the judicial function in I above reveals that:

Government is a necessity of man's political nature, and must be provided whenever and wherever men's interests impinge.

The prime purpose of government, its *raison d'être*, is the maintenance of peace.

The principal means for the maintenance of peace is the judicial function.

The judicial function is also the means by which constitutionalism is maintained and government of law, as opposed to government by men, is guaranteed.

Since disputes are inevitable, it is the ultimate means by which reason is made to prevail over force.

It operates at maximum efficiency when detached from other functions of government and entrusted to impartial judges of learning, experience, and security of tenure.

Man is free only when reason is his ultimate court of appeal.

But the difficulty heretofore has been that there was no government for world affairs—no basis or means for the establishment and implementation of the conditions essential to peace. Two world wars, however, within twenty-five years compelled men to recognize the need and attempt to meet it. The same requirements of human nature which caused governments for the tribe, the city, the state, the nation, impelled two faltering and tentative efforts toward government for world interests which had been brought into impingement by modern inventions and man's evolution. The League of Nations was just what its name

implies and it proved inadequate. The United Nations Organization was an advance over the League, but it was based upon "the sovereign equality of all its members" and failed to provide "for a world order under the rule of law".

The inadequacy of the United Nations Charter became apparent within three months after its adoption. It was approved in June. In August the atomic bomb fell on Hiroshima. The *Christian Science Monitor* then said:

"The new weapon rendered our plans for peace obsolete."

And the *Manchester Guardian* remarked:

"We are now drawn inexorably toward some form of world authority which all nations would accept for the control of a weapon which we dare not leave in national hands."

And Walter Lippmann observed that:

". . . U. N. O. will lack soul, purpose and vitality unless we are working within it, through it, and beyond it, for something greater than U. N. O.

"That something can be nothing less than a world state of law to which all individuals, including the rulers of national states, are subject—under which they have duties, to which they are accountable if they commit world crimes."

The name of "that something", to which Mr. Lippmann refers, is juridical order.[2] Pope Pius XII, in his Christmas message of 1942, said that a fundamental point for the pacification of human society is juridical order. But juridical order cannot exist without an extensive use of the judicial function. What are the obstacles and possibilities?

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2. *Three Pillars of Peace*. Published by Council on World Affairs, Cleveland, Ohio.

PAST EFFORTS

Our first task is to survey past efforts. Having determined the object to be attained, the next step is to study what has been done. The accomplishments and failures of prior efforts should be examined in order to determine what can be done. The means for such study are at hand. In 1914 the Carnegie Endowment for International Peace, and the Brookings Institution joined in publishing *International Tribunals: Past and Future*, by Judge Manley O. Hudson. (Reviewed in Va. Law Rev. V. 31, p. 1014.) It is a summary of the world's attempts to provide agencies for arbitration and adjudication during the preceding one hundred and fifty years—almost the life term, to that date, of nationalism. It is also an analysis of the problems which attend the creation and operation of such tribunals.

Judge Hudson brought to his task a ripe scholarship and rich experience. His work affords us not only a knowledge of what has been done but inspires a hope as to what might be done. Owing to the limitations of this study, we must refer to Judge Hudson's work for details. For our purpose here we shall rely upon some generalizations and broad conclusions.

In the first place it should be noted how many states participated in the efforts to establish international tribunals. That fact alone indicates a worldwide desire to substitute law for force in determining international controversies. Humanity generally has felt the need of lawful order. The tribunals which were established prior to 1900, however, were merely commissions and boards of arbitration. But the work accomplished by such tribunals and the general acquiescence of the great states in their decisions gave a great impetus to efforts for general arbitration

treaties. Regulations were promulgated by the Institute of International Law with the hope of establishing a general law of arbitration. In 1899 the Peace Conference at The Hague provided for the creation of a Permanent Court of Arbitration. Such a court was organized in 1900, but, as Judge Hudson remarks, "It was not a permanent court, and in fact it was not even a court." In spite of its indefinite nature and limited authority, however, this so-called Court of Arbitration accomplished some very good work. Between 1902 and 1920 it decided fifteen disputes between various states.

In 1919 the Peace Conference at Paris decided that a Permanent Court of International Justice should be established and authorized the Council of the League of Nations to formulate plans for such a court. The Statute of the Permanent Court of International Justice was drafted and the Assembly and Council of the League of Nations facilitated its acceptance by many states. Furthermore a solution of the problem of electing judges was made. That problem had baffled all previous efforts. Such solution marked a great advance toward an independent court, for it provided judges who were not representatives of the countries from which they came, but were indeed judges of a World Court.

The proposal to give the court compulsory jurisdiction over all legal disputes, however, was vigorously opposed. The Statute of the court finally provided that any state which desired to confer compulsory jurisdiction on the court might make a declaration to that effect and thereby bind itself to other states making similar declarations. Such declarations were eventually made by forty-five states. The jurisdiction of the Permanent Court of International Justice was further extended by revision of general arbitra-

tion treaties, more than 175 such treaties being concluded. Of the work of this court Judge Hudson says:

> "The Permanent Court of International Justice held its first session at The Hague in 1922, and it continued its activity down to the invasion of the Netherlands in 1940. Several sessions were usually held each year, and in the sixty-five international disputes which came before it, the Court gave thirty-two judgments, twenty-seven advisory opinions, and more than two hundred orders. It thus effected a settlement of numerous disputes, each of which was important to the parties and some of which were of wider significance. Through its advisory opinions, also, the Court rendered assistance to the Council of the League of Nations in the latter's efforts to bring about the settlement of various disputes, and helped to solve legal difficulties which arose in the work of the International Labor Organization. Despite criticism in the measure which was to have been expected, the results of the Court's work have been generally hailed with satisfaction throughout the world, and the volumes of its jurisprudence constitute a notable contribution to the development of international law."

We see in the history of international tribunals the same tendency as was revealed in the history of national courts. There was at first a strong inclination to have tribunals made up of representatives of the opposing parties to the controversy. This tendency appeared in international affairs just as it has appeared when tribunals were created for the settlement of labor disputes. The opposing interests desire to keep strings on the judges, and that tendency works against free and independent courts. Courts so constituted are only boards of arbitration and there are definite limits to arbitration which do not apply to the judicial function. Arbitration boards do not study the

problem in an effort to find fundamental principles on which justice can be established. Their decisions therefore do not contribute to a permanent and continuous growth of law. They merely compromise and balance conflicting claims. Such tribunals continue the process of consultation. And as Professor MacIver has said: "Consultation is no substitute for adjudication." [3] Social stability and civil order are not secured by an ephemeral balance of opposing interests or by tenuous equilibrium between contending forces. Security and peace are founded in impartial administration of law, the object of which is justice.

When the Permanent Court of International Justice was established with judges chosen not as nationals but as men of learning and experience, a court was created which began to make a positive contribution to the judicial process in international affairs and in so far as it was authorized to act it won the confidence of the states and the peoples of the world. Judge Hudson says in his review of the work of the World Court from 1920 to 1942 that no case arose in which a state refused to carry out the judgment of the court.[4]

The history of international courts thus repeats the lesson taught by our experience with national courts: Whenever the administration of justice has been influenced by political, commercial, despotic, popular, or nationalistic considerations, it has failed to attain its purpose; but when judges have been given positions of detachment and security they have shown a record of devotion to truth and justice which is a credit to humanity generally. One of

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3. MacIver, R. M., "The Web of Government", p. 396, New York, Macmillan, 1947, *supra.*

4. Hudson, Manley O., "International Tribunals: Past and Future", p. 127 et seq., *supra.*

the most encouraging revelations of history is that men generally develop to meet the responsibilities imposed on them. The response of men invested with the power to exercise the judicial function warrants a greater reliance on it than has generally been shown. Judge Hudson's survey reveals that the need of the world today is still what it was in 1907 when Elihu Root as Secretary of State instructed our delegates to The Hague Peace Conference to work for "a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international cases by judicial methods and under a sense of judicial responsibility." [5] The need is not only for one permanent tribunal, but for many courts—and courts of mandatory jurisdiction.

THE GREAT OBSTACLE

The greatest obstacle to the establishment of independent courts for the free exercise of the judicial function in international affairs has always been and still is the concept of national sovereignty. The very highest authority,[6] and indeed the undisputed facts of life, reveal this concept of

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5. See generally, Hudson, Manley O., "International Tribunals: Past and Future", Part II, pp. 17-127.

6. Ewing, A. C., "The Individual, the State, and World Government", pp. 207, 210, 255, 274, 276, 281, 314-317, New York, Macmillan, 1947.

Perry, Ralph Barton, "One World in the Making", pp. 92, 93, New York, Current Books, 1945.

Corwin, E. S., "The Constitution and World Organization", pp. 1 to 7, Princeton University Press, 1944.

Babbitt, Irving, "Democracy and Leadership", Appendix B.

sovereignty to be untrue and immoral. There is no sovereignty over world affairs. That is why we have had international anarchy and world wars. National sovereignty in world affairs is in last analysis nothing more than the power to make war. It is simply the determination to exert force against opponents. It is the same assertion of arbitrary will which labor unions and industrial associations assert when they oppose determination of their controversies by third-party judgment. It is immoral because it is contrary to reason and good conscience and because it leads to the assertion of selfish interests against the general community interest. In view of the utter destructiveness of modern warfare the supreme interest and right of the world community to maintain peace have become absolute. Indeed all members of the United Nations Organization have recognized this principle. The difficulty, however, is that the old fetish of national sovereignty still opposes the implementation of the principle.

Claims to sovereignty in world affairs must be abandoned or modified so as to permit the organization of an adequate government for world affairs. A world government is not proposed. All that is proposed is a government for those affairs which are beyond national government. Sovereignty within national bounds would not and should not be disturbed. But the United Nations Organization must be empowered to exercise the sovereignty of law over world affairs without the interference of national veto.

This is necessary because a court authorized to exercise the judicial function cannot exist by itself alone. It must be a part of a greater political organization. There must be a state or some civil government to maintain it and give effect to its judgments. The power of the judicial function

indeed can be entrusted to courts only if their authority is limited to the judicial process. Under such limitation they give judgment only in submitted cases. They do not initiate action, and when they have pronounced judgment their authority is exhausted. To vest more authority in them would be to create a despotic agency and to destroy their judicial character. But for that very reason if their judgments are to be effective they must be supported by other agencies of government.[7]

THE LAW

The exercise of the judicial function necessarily requires a system of law. Whenever the judicial function has been the subject of consideration with reference to international disputes the question arose: What law? During that long period when the attempt was being made to settle international disputes by arbitration the parties often agreed upon the law to be applied. Sometimes the arbitration agreement provided merely that a particular rule of law should not be applied. Sometimes it provided how a particular kind of law was to be appreciated, and sometimes it provided the particular rules of law by which the dispute should be determined. So far as arbitration is concerned, the question could be answered in the *compromis*. But when a Permanent Court was established some permanent system or principles of law had to be established if the court's action was to have uniformity and consistency. The statute which created the Permanent Court, however, was not specific as to the law. Judge Hudson thus accurately states the problem that arises in such conditions:

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7. The Federalist, *supra*, pp. 483, 484.

"As 'a tribunal of international law', the Court has said that it is deemed to know what that law is. Yet no code of international law is at hand for its guidance, and it must therefore *find* the law to be applied. The limitations which surround this process of *finding* the law have not been set by the Statute; they are the general limitations which inhere in the judicial process. The Court is not free to cut out of whole cloth. It must make use of the available jural materials, but it may embark into new realms as those materials guide the way. Where previously established rules or principles do not suffice for a decision which it must take, it may have to lay down new rules or principles for the case in hand; if it is to serve the needs of a society of States, it must have a limited power to *create* law in some cases. To this extent legislation is an element of the judicial function. Yet where a development or extension of the law would require an elaborate legislative framework, the Court may well hesitate; other agencies may exist, or might be created, which would be better equipped to deal with such a situation."

Article 38 of the statute creating the court sets out four categories or sources of materials which the court is directed to employ: (1) International Conventions; (2) International custom; (3) general principles of law; (4) judicial decisions and the teachings of publicists. And the same Article of the statute provides that such enumeration of sources "shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto." [8]

During the period of international anarchy which the two world wars have occasioned, it has become quite common for men to say there is no international law. The

8. Hudson, Manley O., "The Permanent Court of International Justice", Chap. XXVIII, p. 601.

cruel facts of life seem to support the statement, but nevertheless the statement is not true. For hundreds of years there has been a system of principles and rules which have been recognized as international law.[9] They have not always been followed and at time of war they have generally been disregarded. But that does not mean that the rules and principles do not exist; it only means that they are not enforced or respected.

When a modern city is terrorized by gangsters and racketeers it is customary to say that there is no law, or that the law has failed. But what has happened in such cases is that the administration of the law has failed. The agencies for its enforcement are not adequate. In those cases where the administration of law has failed in our own municipalities, order has been reestablished by the intervening of federal agencies. The federal judicial system could operate with more vigor and efficiency because of the independence and security of federal courts and their marshals. They were beyond the reach of the local influences that corrupted the local agencies of law enforcement. That is but a repetition of the experience of England when the justiciars of the reign of Henry II substituted national order for feudal chaos.

Wars and insurrections and violence do not abrogate the law. There are universal principles of positive law and there is a philosophy of law which are eternal and survive all outbreaks of lawlessness. Evil is in the world. Ours is not a perfect life. Evil is in society because it is in each of the individuals of society. As we have seen in part I

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9. In 1908 the author pursued a course in international law at the University of Virginia. It has been a standard course in law schools for a hundred years.

of our present study, government is organized to restrain and suppress the forces of evil. We should not become frustrated or discouraged when the forces of evil seem to gain a temporary ascendancy. We should rather renew and increase our efforts for the maintenance of lawful order. We should not say there is no law, but should at such times recall the words of Cicero, which Professor McIlwain has referred to as one of the finest expressions in all political literature. Cicero said:

> "There is in fact a true law, right reason in accordance with nature, it applies to all men and is eternal. It summons men to the performance of their duties, it restrains them from doing wrong. . . . To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law . . . It will not lay down one rule at Rome and another at Athens . . . But there will be one law . . . binding at all times upon all peoples . . . The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishments."

That conception of law is what has been referred to for two thousand years as natural law. It should not be confused with what is known as scientific law. It means law which is natural to man because of his character as a social and moral person. In other words, natural law refers not to man's physical nature but to his human nature. It is what the statute of the Permanent Court of International Justice refers to as "the general principles of law recognized by civilized nations", or what the Romans referred to as *jus gentium*, and it is also what the statute refers to

as decisions *ex aequo et bono*. As Judge Hudson says, the phrase *ex aequo et bono* has its roots in Roman law.[10]

Much of our trouble today in domestic and in international affairs is due to our departure from that ancient and respected philosophy of law, that philosophy which Dean Pound says is "the oldest, longest continued, and most persistently enduring type, and the one with the most notable achievements to its credit in legal history". As we have seen from our study in I above, it was the philosophy of law upon which the great jurists of the 13th Century laid the foundations of constitutionalism.

The abandonment of the true philosophy of law is definitely associated with the impractical and immoral claims of national sovereignty in international affairs. When such extremes of nationalism began to assert themselves in the 17th Century they could not be justified by the principles of natural law philosophy. The philosophy of positivism was therefore invented to rationalize the assertions of arbitrary will by the nationalistic states.[11] Such false philosophy of law led naturally to the *Realpolitik* of the totalitarian states and to the abuse of administrative processes in our own country. As Harold R. McKinnon has said: "The real ground for concern is that while a nation may survive errors of practice, it cannot permanently survive false principles, which sooner or later become incarnated in everyday life." [12]

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10. Hudson, Manley O., "The Permanent Court of International Justice", *supra*, p. 618, and quotation in note 1 from Voigt: *Das jus naturale, aequum et bonum und jus gentium der Römer.*

11. Seagle, Wm., "Men of Law", p. 114, New York, Macmillan, 1947. Babbitt, *supra*, pp. 37, 42, 53.

12. ABA Journal, Vol. 33, p. 966 (Sept. 1947).

It is absolutely necessary therefore if we are to extend the judicial function to international disputes that we accept not only the fundamental principles of law which civilized nations have recognized but also a sound and practical philosophy of law. As Dean Pound has said:

> "Philosophical jurisprudence has studied the philosophical basis of legal institutions, legal doctrines and legal precepts and sought to reach fundamental *principles of universal law* through philosophy. Applied to particular systems of law it has sought to organize and formulate their ideal element, that is, the ideas of the end of law, of the ideal social and legal order, and of what legal precepts should be in the light of those ideas, which have been traditionally received and have become no less authoritative than the traditional precepts and technique. Thus philosophical jurisprudence has sought to give us a critique of the positive law, a starting point of juristic development, doctrinal writing, and judicial finding of law, and a guide to lawmaking."

The important thing for us to bear in mind is that there is a great body of highly respected experience and teaching which may be used for fundamental principles of world law, and there is a philosophy which may serve as a critique and norm for the future positive law of the world. If courts were established by the United Nations Organization to exercise compulsory jurisdiction over international disputes according to such principles of positive law and such philosophy of law, they could do for the conflicting nations of the world what the courts of the 12th and 13th centuries did for the warring feudal estates of Europe.

It is an encouraging sign that the Committee on the Progressive Development of International Law and Its Codification, established by the resolution of the General

Assembly of 11 December 1946, has recommended the creation of a permanent commission to carry into effect the provisions of Article 13(1)(a) of the Charter, that it be known as the International Law Commission (ILC), and that it be authorized to assume two tasks: (1) the "progressive development" of international law where it has not yet been formulated in the practice of the States, and (2) the "codification" of the law where there has been extensive State practice, precedent and doctrine.[13] Furthermore, the Hague Conference on Private International Law has done valuable work of development and codification in this field.

PRESENT SITUATION

The world's need for courts has, as we have seen, been quite generally recognized. Indeed the recognition of the need has been so universally acclaimed that it is hard to understand why more has not been done to supply the need. The very first words of the United Nations Charter recognize that its purpose is the same as the purpose of all governments throughout history:

> To maintain international peace and security; to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and in conformity with the principles of justice and international law, adjustment of international disputes or situations which lead to a breach of the peace.

Section 3 of Article 2 of Chapter I provides that "all members shall settle their international disputes by peaceful means in such a manner that international peace and

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13. United Nations, General Assembly, A/331—18 July 1947.

security and justice are not endangered." And Article 7 of Chapter III provides that "There are established as the principal organs of the United Nations: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat." Article 33 of Chapter VI provides that parties to any dispute shall seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement. And Article 36 of the same Chapter provides that the Security Council may at any stage of a dispute recommend appropriate procedures or methods of adjustment. And then Section 3 of Article 36 provides: "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

The Statute of the International Court of Justice "is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." And Article 93 of Chapter XIV says: "All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." We have already seen, however, that the Statute of the Permanent Court of International Justice (created under the League of Nations) was not given compulsory jurisdiction. Twenty-seven states, however, have conceded such jurisdiction to the present International Court of Justice with reference to disputes with other states which have conceded such compulsory jurisdiction. It is regrettable that our own country could not accept the provision of the Statute for compulsory jurisdiction without imposing an exception and limitation. The American Bar Association

has recommended that our government withdraw its reservations and join with all other states that have granted complete jurisdiction to the International Court.

In light of history and in view of the tragic threat that hangs over the world it is impossible to understand the reluctance of any state to give its full support to the implementation of the principles that have been so clearly announced in the Charter and accepted by so many states of the world. (27 to date.) When the member states recognize that the purpose of the United Nations Organization is peace and security and when they obligate themselves to settle their disputes by peaceful means in conformity with the principles of justice and international law, it is impossible to understand their reluctance to provide sufficient independent courts to exercise fully and completely the judicial function. Does history reveal any peaceful means for the settlement of ultimate disputes other than third-party judgment? If the nations really mean what they say in general terms, why do they not obligate themselves to perform in specific terms? Until courts are established with full power to issue mandatory process and exercise the judicial function, the beautiful pronouncement of purposes in the Charter will but

> "keep the word of promise to the ear, And break it to our hope."

Not only does the Charter itself express a purpose for an exercise of the judicial function, but subsequent action by agencies of the United Nations have expressed the basic need. The Draft of an International Bill of Rights prepared by the committee of the Commission on Human Rights for the Economic and Social Council states in Article 27: "There shall be access to independent and im-

partial tribunals for the determination of rights and duties under the law." The report of the Drafting Committee in Chapter III discusses "the question of implementation of an international bill of rights" and says: [14]

> "(a) That a declaration of human rights and fundamental freedoms in a resolution of the General Assembly would in itself have considerable moral weight; but (b) that a more effective method for establishing human rights would be to embody them in a Convention in which the signatories would recognize them as international; (c) that the signatories of such a Convention should also accept the obligation to insure that those rights be enforcible by domestic laws in domestic courts; . . . (e) that an International Court of Human Rights, along the lines of the Australian proposal, be established for the adjudication of cases of alleged violation of human rights."

The words of the proposed Draft express the very spirit of fundamental and natural law, and both expressly and by implication call for implementation of the judicial function. Article 26 says: "No one shall be convicted of crime except by judgment of a court of law, in conformity with the law, and after a fair trial at which he has had an opportunity for a full public hearing." The Australian proposal, referred to above, said: "That the Commission had an obligation under Article 56 to implement those rights and freedoms already laid down in the Charter. It was necessary to establish effective machinery to make those human rights and fundamental freedoms a reality."

The Commission to Study the Organization of Peace, research affiliate of the American Association for the United Nations, has recommended "That an international

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14. Bill of Rights. United Nations. E/CN. 4/AC. 1/3. Add. 1. 2 June 1947.

criminal tribunal should be set up by the United Nations with competence to try individual offenders." [15] The Nuremberg trial is cited.

Furthermore, numerous responsible organizations and individuals have recommended the establishment of courts for the determination of disputes arising from international trade and commerce.[16] The very highest economic authority today recognizes that peace and prosperity depend on a full opportunity for trade and travel throughout the world.[17] Kahlil Gibran has stated this fundamental truth in his wonderful little book, "The Prophet". He says: "It is in exchanging the gifts of the earth that you shall find abundance and be satisfied." (p. 43). But there cannot be a free exchange of the gifts of the earth unless the judicial function is available for rational determination of the misunderstandings that are inevitable in human affairs. The prosperity of the United States of America has been due largely to the freedom of commerce and trade among all

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15. Summary of Report published in Newsweek June 16, 1947. Drafting Committee included Quincy Wright, Arthur N. Holcomb, Clyde Eagleton, Malcolm W. Davis, James T. Shotwell, Sumner Welles.

16. See reports of Section on International and Comparative Law, American Bar Association.

17. Heilperin, M. A., "Basis for Peace—Freer World Trade", New York Times Magazine, Sept. 7, 1947.

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the states, and that freedom has been possible because our Constitution established a system of federal courts for the protection of all those engaged in interstate commerce. A system of world courts would do the same for the world.

CONCLUSION

The entire history of man's political evolution supports the belief that if the United Nations would increase and extend the authority and power of the International Court of Justice and establish and maintain other international courts at strategic points with full power to exercise the judicial function for the maintenance of peace and the enforcement of obligations recognized in the United Nations Charter, most of the disquieting conditions and causes for fear and suspicion would be allayed and the world at large would move into an era of peace and prosperity. The good work which other agencies of the United Nations is doing should not be overlooked or neglected. But there is every reason to expect that if the judicial function were set in operation through independent courts on a world-wide base, the great problems which now seem impossible of solution would gradually disappear. The apparently insurmountable obstacles of nationalism, race, religion, and economic ideology would gradually be worn away and dissolved by the operation of the judicial function in accordance with the fundamental principles of positive law and the philosophic principles of natural law. If the fundamental rights and liberties of men are recognized and protected, the importance of nationalism and race disappears. What courts of law did in Europe and especially in England in the 12th and 13th centuries, and what the federal courts have done in the United States in the 18th and 19th

centuries, courts of law can now do for the world at large. The history of the judicial function warrants a fair trial of it in that field.

As Reinhold Niebuhr has said:

> "The best protection against future peril lies in an attitude of soberness which is not too concerned about the future but seeks each day to do what can be done within the limits of historic possibilities." [19]

In closing let us refer again to the quotation from Professor Perry at the end of II above wherein he defines the particular function of the court in making and applying the law. And then let us quote again from the same source:

> "All of these considerations apply, with changes of emphasis, to international courts which are an indispensable adjunct of international law. The present is largely a phase of formulation and declaration. But as rapidly as international law is adopted, the matters to which it refers will become, as we say, 'justiciable'. An international court will interpret international law and determine the legality or illegality of the concrete acts of nations relatively to other nations or of nationals relatively to other nationals. Whether there shall be a resort to international courts by individuals or only by governments is only a procedural question which is yet to be answered. In any case, the role of the international court will in the near future be peculiarly creative because of the relatively large amount of new law whose meaning is yet to be clarified and applied."

In last analysis our urgent need is faith. To bind ourselves in advance to submit all differences to third-party judgment requires faith in impartial judges and the judicial

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19. Virginia Quarterly Review, Vol. 23, No. 1.

process. But in spite of all our experience, in spite of two thousand years of teaching, and in spite of all our professions, we still lack that faith. We still barter and trade and rely on force. We still insist on partisan judges. We still prefer the assertion of our arbitrary wills to the rule of reason. But impending disaster now demands that we submit our disputes to impartial tribunals or run the risk of utter destruction.

If this study has in any way accomplished its purpose, it has tended to present two general truths: (1) Man's political nature and the moral order of life in this world make it necessary to repose faith in others. We cannot live to ourselves alone. The unity of mankind which has been taught by religion for centuries is now made manifest by science. The community interest which required authority in the family, in the clan, in the state, in the nation, now requires it in the United Nations. (2) The evolution of the judicial function reveals it as the prime and essential means for the maintenance of peace. It is the only way in which reason can supplant force in the settlement of ultimate disputes. Wherever it has been used it has worked well. The judicial function is not a panacea. It is not perfect. Nothing that operates through human agencies is perfect. But it has been the means for man's greatest approximation of justice. At this critical period of our history it is encouraging to know that with rare exceptions whenever trained and impartial judges have been entrusted with the exercise of the judicial function they have proved worthy of that trust. "By works was faith made perfect."